88-1515

No.

Supreme Court, U.S.
FILED
MAR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

RAINIER VIEW ASSOCIATES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Department of Housing and Urban Development (HUD) is prohibited by 42 U.S.C. 1437f(c)(2)(A) and (C) and its implementing standard form contracts from effectuating through individual market studies the statutory and contractual mandate that the rent increases paid by the federal government to the owners of "Section 8" low-income housing units not result in rents exceeding those in comparable private units, because HUD chose to establish presumptive rent adjustment levels by a formula.

PARTIES TO THE PROCEEDING

Petitioner, defendant below, is the United States of America, acting through the United States Department of Housing and Urban Development. The Housing Authority of the City of Bremerton (Washington) was also technically a defendant in the district court, but it consented to the entry of a default judgment in the district court (see App., *infra*, 22a n.1) and did not appear in the court of appeals. Respondents, plaintiffs below, are Rainier View Associates, a Washington Limited Partnership; and Kurtis R. Mayer and Pamela Mayer, doing business as Mayer Built Homes.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 848 F.2d 988. Other orders of the court of appeals in this case (App., *infra*, 42a, 49a) are reported at 830 F.2d 1017 and 840 F.2d 741. Other orders and opinions of the court of appeals in this case (App., *infra*, 35a-36a, 50a-51a, 57a, 58a) are unreported. The opinion of the district court (App., *infra*, 8a-15a) is unreported. Other opinions and orders of the district court in this case (App., *infra*, 16a-34a, 37a-41a, 43a-48a, 52a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 59a) was entered on June 6, 1988. A petition for rehearing was denied on November 15, 1988 (App., *infra*, 60a). On February 13, 1989, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Before its amendment in 1988, Section 8(c)(2) of the Housing Act of 1937, 42 U.S.C. 1437f(c)(2), provided in pertinent part:

> (A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary [of Housing and Urban Development] determines, on the basis of a reasonable formula.
>
> * * * * *
>
> (C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

Subsection (c)(2)(C), as amended on February 5, 1988, and November 7, 1988,[1] provides in pertinent part:

> (C) Adjustments in the maximum rents under subparagraphs (A) and (B) shall not result in material

[1] See Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(c)(2) and (d), 101 Stat. 1850; Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. No. 100-628, § 1004(a), 102 Stat. 3264.

differences between the rents charged for assisted units and unassisted units of similar quality and age in the same market area, as determined by the Secretary. If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied. The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner. Any maximum monthly rent that has been reduced by the Secretary after April 14, 1987, and prior to the enactment of this sentence shall be restored to the maximum monthly rent in effect on April 15, 1987. For any project which has had its maximum monthly rents reduced after April 14, 1987, the Secretary shall make assistance payments (from amounts reserved for the original contract) to the owner of such project in an amount equal to the difference between the maximum monthly rents in effect on April 15, 1987, and the reduced maximum monthly rents, multiplied by the number of months that the reduced maximum monthly rents were in effect.

STATEMENT

In 1974, Congress added the "Section 8 program" to the Housing Act of 1937. See 42 U.S.C. 1437f. The Section 8 program generally provides for subsidized housing for lower income tenants. The tenant's rent payment is deter-

mined by the tenant's ability to pay, rather than the market value of the unit. See generally 42 U.S.C. 1437a(a), 1437f(c)(3); 24 C.F.R. 813.107. The remainder of the lawfully authorized rent is paid by the federal government.

The Section 8 new construction and substantial rehabilitation program provides federally subsidized housing to millions of low-income tenants. It is one of the largest housing programs administered by the United States Department of Housing and Urban Development (HUD), with a total of approximately $115 billion in projected federal subsidies due to project owners under existing standard form long-term contracts (known as "housing assistance payment contracts" or "HAP contracts"). Approximately 18,000 such contracts are in effect nationwide, and all are subject to the statutory and implementing contractual language whose construction is the subject of this case.

The Section 8 program was the first to provide statutory authority for inflation-based rent adjustments. "[I]n structuring section 8, Congress meant it to be a market program."[2] Thus, "[t]he Section add[ed] [a] new concept[] to the leasing program—* * * fair market rents." S. Rep. No. 693, 93d Cong., 2d Sess. 45 (1974). The basing of rent adjustments on market considerations was accomplished through Section 8(c)(2), 42 U.S.C. 1437f(c)(2), which before 1988 provided in pertinent part:

> (A) The assistance contract shall provide for adjustment annually or more frequently in the maxi-

[2] *Section 8 Rent Adjustments, Elderly Housing, and Other Assisted Housing Issues: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs,* 98th Cong., 2d Sess. 21 (1984) (testimony of Charles L. Edson, Counsel, National Leased Housing Association) [hereinafter *1984 Hearing*].

mum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary [of Housing and Urban Development] determines, on the basis of a reasonable formula.

* * * * *

(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

As noted, HUD has implemented Section 8 by entering into thousands of long-term form contracts providing for billions of dollars in rent subsidies. Section 1.9b of each contract implements Section 8(c)(2)(A) of the statute; Section 1.9d implements Section 8(c)(2)(C). Section 1.9 provides in pertinent part:

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such factors and the basis for their determination will be published in the Federal Register * * *.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted

> Contract Rents be less than the Contract Rents on the effective date of the Contract.
>
> * * * * *
>
> d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

App., *infra,* 3a. HUD has promulgated regulations that implement the statute in the same way as the contracts. See 24 C.F.R. 880.609; note 13, *infra.*

From 1974 to 1981, HUD regularly awarded rent increases in accordance with published Automatic Annual Adjustment Factors (AAAFs), which were based on the Consumer Price Index (CPI).[3] In order to ensure that CPI-based AAAFs would not result in rents that were too *low*, HUD did two things.

First, on November 25, 1977, it published in the *Federal Register* a regulation (codified ever since as 24 C.F.R. 888.204) that permits a project owner to show HUD that "application of the [AAAFs] results in rents that are substantially lower than rents charged for comparable units not receiving assistance under the U.S. Housing Act of 1937, in the area for which the [AAAF] was published or a portion thereof, and * * * that the costs of operating

[3] HUD later began publishing AAAFs based on a combination of the CPI and the Annual Housing Survey (AHS). See App., *infra,* 9a. The AHS has recently been renamed the Bureau of the Census American Housing Surveys. See 52 Fed. Reg. 9478 (1987).

comparable rental housing have increased at a substantially greater rate than the [AAAFs]." 42 Fed. Reg. 60,508-60,509. On such a showing, HUD "will consider" adjustments in the form of changes to the AAAFs. Second, in 1978, HUD published a handbook that also provided, in Paragraph 7-8d, for revisions to AAAFs based on showings by project owners that the AAAFs resulted in less-than-comparable rents. Paragraph 7-8a(4) of that handbook purports to provide a procedure for "review [of] the accuracy of the [AAAF-level] rent adjustment to ensure that it is comparable (neither too high [n]or too low) in relationship to similar assisted and unassisted units." Specifically, Paragraph 7-8a(4) provides for revision of the AAAFs "in accordance with the revision procedures in paragraph 7-8[d](2) and (3)."[4] The procedure described in Paragraph 7-8(d)(2) and (3), however, on its face and by its nature applies only when AAAF-level rents are too low, not when they are too high—the situation addressed in this case. No AAAF was ever revised downward because of a showing that a AAAF-level rent was too high.[5]

Beginning in 1981, HUD decided that it was not doing enough to implement the mandate of Section 8(c)(2)(C) and Section 1.9d that application of Section 8(c)(2) and Section 1.9 "not result in material differences between the rents charged for assisted and comparable unassisted units." Specifically, HUD became concerned that it was doing nothing to ensure that the CPI-based AAAFs did not result in rents that were too *high*. HUD therefore

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[4] The handbook actually refers to "paragraph 7-8c(2) and (3)," but the "c" is an obvious error because paragraph 7-8c has no subparagraph (3) and does not provide a revision procedure for AAAFs.

[5] HUD never actually implemented Paragraph 7-8 of the 1978 handbook. The handbook was rescinded in 1981.

began reviewing the rents charged in certain individual projects. The review took (and continues to take) the form of a survey of rents in a small geographic area surrounding the project whose rents are being reviewed. If such a "comparability study" shows that the rents that would result from application of the AAAFs would be substantially higher than those for comparable unassisted units, then HUD uses the comparability study to cap the amount of the rent increase that would be produced using the formula standing alone. It is the statutory and contractual authority of HUD to use such studies to implement the comparability mandate that is at issue here.

This case consists of two actions for declaratory judgments that were consolidated in the United States District Court for the Western District of Washington. Respondents are two owners of Section 8 projects in the Seattle area. In 1976 respondents Mr. and Mrs. Mayer, and in 1980 respondent Rainier View Associates, entered into HUD form contracts that are, in all pertinent respects, identical to the form contract whose Section 1.9 is quoted above. App., *infra,* 18a-21a. In 1983, AAAF-level rent increases were denied to both respondents. Respondent Rainier View Associates was denied a AAAF-level rent increase when it refused to conduct a comparability study. The other respondents, Mr. and Mrs. Mayer, were denied a AAAF-level rent increase when a comparability study showed that their rents were substantially higher than those for comparable unassisted housing units. *Id.* at 20a-21a. In their declaratory judgment actions, respondents claimed, among other things, that they had statutory and contractual rights to receive AAAF-level rent increases free of any caps based on comparability studies.[6]

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[6] The plaintiffs have also contended that the Due Process Clause prohibits HUD from conducting comparability studies without first

The district court rejected those arguments. The district court read Section 8(c)(2)(C) to mean that "[a]pplication of the formula determined by the Secretary may not * * * result in material differences between the rents charged for assisted and comparable unassisted units." App., *infra,* 12a. It also read the contract to refute plaintiffs' claim of entitlement to automatic rent increases (*id.* at 13a):

> To hold that plaintiff is entitled automatically to annual rent adjustments would be contradictory to the language in Section 1.9(d) providing an overall limitation on adjustments arrived at under Section 1.9. Thus, plaintiff's contention that the Seattle area office of HUD lacks authority to refuse to adjust plaintiff's rent levels automatically is without merit. This authority is clearly provided in Section 1.9(d) of plaintiff's HAP Contract.

The court of appeals reversed per curiam.[7] After stating the case and the contentions of the parties, the Ninth

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adopting nationwide standards for selecting projects and for conducting such studies. The district court has held in a separate phase of this litigation that the Due Process Clause requires that HUD develop such nationwide standards. App., *infra,* 25a-34a. Although we believe that ruling is in error, HUD has now adopted comprehensive nationwide standards and procedures. As to future rent increases, therefore, the ruling of the court of appeals concerning statutory and contractual construction is the only legal impediment that would prevent HUD from implementing its comparability system as to respondents. As to *past* decisions to limit respondents' rent increases, however, there is no longer a live controversy between the parties because HUD long ago administratively determined, for reasons largely independent of the due process and statutory/contract interpretation issues, that repondents were in fact entitled to the full AAAF-level rent increases.

[7] Before the panel ruled on the merits, the panel sua sponte suggested, and the en banc court voted, that the case be heard en banc on a jurisdictional question. The en banc Ninth Circuit considered whether, under the Ninth Circuit's decision in *North Side Lumber Co.*

Circuit concluded that "HUD misconstrues the role of the overall limitation." App., *infra,* 5a. The court provided only three short paragraphs of explanation for that conclusion. First, the court said that "[t]he overall limitation in section 1.9d, consistent with its statutory analog, Section 8(c)(2)(C), is clearly a limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments." This was because "HUD's interpretation of the overall limitation provision would render the formula method authorized by the statute and elected in the contract a nullity." *Id.* at 5a-6a. Second, the court read 24 C.F.R. 888.204 to "interpret the overall limitation provision in the statute the same way we interpret the overall limitation provision in the contract—as permitting adjustments of the AAAFs, not abandonment of the formula method whenever application of the formula would result in a disparity between section 8 and other rents." *Id.* at 7a. Finally, the court said, "the contract clearly elects the formula method, one of two statutorily authorized methods for calculating rent adjustments. The overall limitation provision just as clearly authorizes modifications of the formula applied to keep assisted rents in line with market rents. What the overall limitation provision does *not* do is permit HUD to switch from one method to another." *Ibid.*

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v. *Block,* 753 F.2d 1482, cert. denied, 474 U.S. 931 (1985), this action should have been dismissed as an impermissible action for a declaratory judgment on a claim against the United States founded on an express contract, and, if so, whether *North Side Lumber* was correctly decided. In an unpublished order dated March 7, 1988, the en banc court declined to determine whether *North Side Lumber* was correctly decided, on the ground that there was no jurisdictional problem even under *North Side Lumber.* According to the en banc court, "this case, although 'contract-related,' rests at bottom on statutory or regulatory rights." App., *infra,* 50a.

During the pendency of the present case, a new action, involving the same legal issues but different parties, was brought in the United States District Court for the Western District of Washington and assigned to the same judge who presides over respondents' case. The district court has already entered summary judgment in favor of nearly 50 additional Section 8 project owners, who are the plaintiffs in that case, based on the ruling of the court of appeals at issue here. *Bellevue Manor Associates* v. *United States,* No. C86-1626R (W.D. Wash. Jan. 4, 1989).[8] The

[8] Even before it entered judgment in the *Bellevue Manor* case, the district court claimed the power to extend to nonparties its ruling in favor of respondents. See App., *infra,* 43a-48a, 52a-56a. Although only respondents are plaintiffs in this action, and although the district court based its claim to jurisdiction on the proposition that respondents are not seeking damages (*id.* at 11a), the district court has indicated that, on pain of contempt (see *id.* at 53a), the government must apply the district court's rulings to *all* project owners in the Western District of Washington and must "make the required annual rent adjustments, *both retroactive and prospective,* on all Section 8 projects by applying the AAAF factors" (*id.* at 54a (emphasis added)). The court described the government's argument that "the court * * * did not specifically order retroactive payment of rent adjustments"—the very point that formed the basis for the district court's assertion of jurisdiction in the first place—as a "linguistic loophole[] which the government has sought to exploit." *Ibid.* The government appealed from those rulings, which the court of appeals stayed. *Id.* at 57a. The day after rehearing was denied in the present case, however, the court of appeals dismissed the government's appeal in that case as "moot." *Id.* at 58a. The government has sought rehearing of the dismissal order, and in response to our rehearing petition respondents have agreed that that appeal is *not* moot. Even if the appeal were moot, however, the action of the court of appeals in dismissing the government's appeal outright, and not vacating the judgment of the district court, would be flagrantly contrary to this Court's decisions. See *Great Western Sugar Co.* v. *Nelson,* 442 U.S. 92 (1979). The government's rehearing petition in the appeal from the rulings extending the district court's order to nonparties remains pending.

government has appealed that judgment. In addition, respondents' counsel, who also represents the plaintiffs in the follow-on case, has threatened to bring a class action on behalf of all affected project owners within the Ninth Circuit if HUD does not agree to disregard any limits on rent increases it has imposed based on comparability studies, and does not accordingly pay rents, retroactively, at the level they would have reached under the AAAFs. HUD estimates that the amount of money that it would have to pay to Section 8 project owners on that basis if the decision of the Ninth Circuit were allowed to stand, retroactively up through fiscal year 1988, would be $50 million within the Ninth Circuit alone (and that amount is of course growing every day). HUD further estimates that the analogous nationwide figure would be more than $200 million.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is clearly wrong. It goes to a core feature of one of the government's largest nationwide housing subsidy programs: how to calculate rent adjustments, and therefore the extent of the federal subsidy, after initial rents have been set. The effect of the decision below would be to grant Section 8 project owners AAAF-level rent increases that, *by definition,* have been shown by market surveys to result in rents substantially higher than those for comparable unassisted units. The Ninth Circuit has converted a program designed to attract landlords by assuring them that they will receive full market rents into a program in which landlords would receive formula-based rents that have been determined to *exceed* market rents, all because of a perceived—but in fact nonexistent—inconsistency between HUD's decision to use a formula to set presumptive rent increases for

projects in large areas and its use of individualized comparability studies to cap those increases when such studies reveal that the formula would produce above-market rent levels. The question presented is of substantial importance to the federal government. If not reversed, the erroneous decision of the court of appeals will cause federal taxpayers to suffer an immediate, irretrievable, and unjustified loss estimated at $50 million, potentially to be followed by further large losses. This Court should not permit the imposition of such liability on the basis of a decision whose analytical flaws are as plain as those of the decision below.[9]

1. The basic issue of statutory and contract interpretation in this case is straightforward. The language of the statute and the language of the contracts conclusively

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[9] We also continue to believe, as we urged before the district court and the en banc court of appeals, that at least to the extent this action calls for construction of HUD's Section 8 form contracts, the district court never had jurisdiction over this action in the first place. Federal district courts do not have jurisdiction to enter declaratory judgments that the United States is in breach of contract. See *Sharp* v. *Weinberger*, 798 F.2d 1521, 1523-1524 (D.C. Cir. 1986) (Scalia, J.) (and cases cited therein); *North Side Lumber Co.* v. *Block*, *supra*; see also *Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2746 (1988) (Scalia, J., dissenting). The en banc court of appeals avoided that rule by holding that this case required the interpretation of statutes and regulations rather than contracts. Nevertheless, the court of appeals panel then interpreted both the statute and the contracts. See, *e.g.*, App., *infra*, 2a ("In this action for declaratory relief, we consider a question of contract interpretation * * *."); *id.* at 7a ("We thus hold that the contract unambiguously support [*sic*] Rainier's interpretation."). We feel obliged to call that jurisdictional defect to the Court's attention, but we have elected not to petition for certiorari on the issue, because the claim raised under the statute may give rise to district court jurisdiction over at least part of this action under this Court's decision in *Bowen* v. *Massachusetts*, *supra*; and because a prompt and final resolution of the issue that the Ninth Circuit has decided on the merits is so vital to the proper administration of a huge, ongoing, nationwide program.

refute the Ninth Circuit's view that the only way HUD can carry out the mandate of Section 8(c)(2)(C) is somehow to incorporate the comparability determination into the AAAFs. Congress's recent amendments to the statute, although concededly prompted by displeasure at other features of HUD's administration of the Section 8 program, confirm the correctness of the government's position on the issue presented here, *i.e.*, that the use of project-specific comparability studies to limit AAAF-level rent increases is an entirely permissible way of carrying out Section 8(c)(2).

a. Congress unambiguously directed HUD to ensure that periodic adjustments in rents would "not result in material differences between the rents charged for assisted and comparable unassisted units." 42 U.S.C. 1437f(c)(2)(C). Pursuant to that directive and 24 C.F.R. 880.609(c), HUD prepared, and the project owners signed, form contracts that provide: "*[n]otwithstanding any other provisions of this Contract,* adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government" (emphasis added). Thus, the fact that HUD has legal authority to ensure comparability is beyond dispute. What is disputed is *how* HUD may carry out that mandate.

To answer that question, one would naturally expect to look to the statute, to see what guidance Congress gave HUD as to how to carry out the comparability mandate, and to the contract, to see what commitments HUD made as to how it would carry out that mandate. *But the contract and the statute say absolutely nothing about the methodology for ensuring comparability.* Section 8(c)(2)(A) and Section 1.9b, which set forth the presumptive methodology for determining rent adjustments, say

nothing about comparability. And Section 8(c)(2)(C) and Section 1.9d, which set forth the mandate of comparability, say nothing about the presumptive methodology for determining rent adjustments. Thus, neither Congress in the statute, nor the contracting parties in the contract, have said anything that imposes on HUD *any* particular technique for conforming its rent-setting methodology and the mandate of comparability. The obvious conclusion is that the choice of techniques for harmonizing the two statutory mandates was left to HUD, a conclusion borne out by the phrase "as determined by the Secretary" at the end of Section 8(c)(2)(C) and the phrase "as determined by the Government" in Section 1.9d.

HUD has chosen an entirely reasonable way to carry out the twin mandates of Section 8(c)(2)(A) and (C). Under Section 8(c)(2)(A), and Section 1.9b of the contracts, HUD makes generalized determinations, over relatively wide geographic areas, of the presumptively appropriate formula for adjusting rents each year. See, *e.g.*, 52 Fed. Reg. 9478-9491 (1987) (AAAFs for four Census regions, the States of Alaska and Hawaii, and 72 metropolitan areas). Because there will always be economic variations within those areas, the formula necessarily cannot assure that in each specific case the formula-based rent increases will "not result in material differences between the rents charged for assisted and comparable unassisted units." Therefore, when HUD has reason to believe that AAAF-level rent increases would be excessive, it spot checks rents for particular projects by means of comparability studies focused precisely on those projects and a small surrounding area. When no material difference is discovered, HUD leaves the rent increases at the levels set by application of the AAAFs. But, when a material difference is discovered, HUD limits the rent increases so that they do

not materially exceed comparable rents.[10] The Ninth Circuit did not deny that this process produces exactly the result—comparable rents—that Congress intended.

The Ninth Circuit nevertheless found it "clear" that, once HUD has elected to adjust rents by formula, the *only* way HUD may ensure comparability is to incorporate the comparability constraint into the formula itself.[11] No statutory language was cited to support that proposition. No contract language was cited to support that proposition. All the Ninth Circuit provided by way of explanation was a claim that any other result "would render the formula method authorized by the statute and elected in the contract a nullity," and a further claim that HUD's own regulations read the statute that way. App., *infra,* 6a-7a. Both claims are far off the mark.

Allowing HUD to check selected rents by comparability studies does not render the formula method of increasing rents a nullity, any more than allowing the Internal Revenue Service to check selected tax returns by audits renders the self-reporting system a nullity. HUD does not

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[10] Since April 15, 1987, HUD has been prohibited from reducing rents below those that prevailed in the prior year. See Housing and Community Development Act of 1987, Pub. L. No. 100-242, § 142(d), 101 Stat. 1850; Stewart B. McKinney Homeless Assistance Amendments Act of 1988, Pub. L. No. 100-628, § 1004(a), 102 Stat. 3264. Congress has not, however, prohibited HUD from denying or limiting rent *increases* based on comparability studies.

[11] Not even respondents were so bold as to advance that proposition before the Ninth Circuit. See Rainier View C.A. Reply Br. 3 ("This Court is not being asked to determine which interpretation is correct. The only issue is whether the rent adjustment provisions are reasonably susceptible of the meaning asserted by Plaintiffs, given the statutory background."). Only the court of appeals went so far as to find that the statute and contracts support respondents' position "unambiguously."

do a comparability study in *every* case, and for that reason alone there is no substance to the Ninth Circuit's claim that doing comparability studies amounts to abandoning the formula method of setting rents. HUD estimates that only approximately 10% of all Section 8 projects in the nation have been the subject of comparability studies in any year. The remaining 90% have received AAAF-level rent increases. The AAAFs have thus been used as a presumptive guide to rent increases in all cases, and as the final determinant of rent increases in those cases—the vast majority—in which HUD has not made an individualized comparison of the rents charged at a particular project with market rents, or in which that comparison has shown that the AAAF produced a figure not materially different from the market. By no stretch of the imagination can it be said that that process renders the formula a nullity.

Furthermore, the Ninth Circuit misunderstood the "market survey" concept. The two things to which the court applied the same label—"market survey"—are, in fact, not the same at all. Fair Market Rental (FMR) surveys report rents charged in a large number of units in broad geographical areas, typically multicounty. See 24 C.F.R. 888.103; 53 Fed. Reg. 14,954 (1988). Under Section 8(c)(2)(A), HUD could appropriately have used that type of market survey, in lieu of the AAAFs, to establish general adjustment levels for extensive areas. By contrast, a comparability study compares one assisted housing project with one to five individual housing projects that have similar unassisted units in the same local area. That is done because, for units to be truly comparable for rent-level purposes, they must be located in close proximity to each other (since even small distances between projects may vastly alter their rental value), and must be as similar to each other in all other relevant aspects as possible. See *1984 Hearing, supra,* at 66-67. To conduct the latter type

of survey is not to elect the "market survey" option referred to in Section 8(c)(2)(A), but to fine-tune the Section 8(c)(2)(A) determinations—which are based on a broad geographic area, whether a formula or a survey is used—by means of surveys focused on a narrower geographic area.

The Ninth Circuit's "nullity" argument would be unpersuasive for yet another reason, even if the foregoing two points did not exist. The contract provision setting out the comparability mandate begins with the words "[n]otwithstanding any other provisions of this Contract." Those are the words one uses for the precise purpose of overriding other provisions, when in operation they are inconsistent. The provision is also labeled an "overall limitation"—language that again indicates that anything to the contrary yields to the mandate of comparability.[12] The only reasonable way to read those words is that HUD wanted to preserve its ability to ensure that other contract provisions "not result in material differences between the rents charged for assisted and comparable unassisted units," no matter what those contract provisions said.

The statute likewise sets out the comparability mandate in unqualified terms. 42 U.S.C. 1437f(c)(2)(C).[13] It says

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[12] Our interpretation of the "overall limitation" treats it as something that applies "overall" and *limits* the application of the other provisions of the contract. The Ninth Circuit's interpretation, by contrast, treats the "overall limitation" as subordinate to another provision of the contract and *limited by* that provision. The court has taxed us with "misconstru[ing] the role of the overall limitation" (App., *infra*, 5a), but it has given no explanation of why it is wrong to treat an "overall limitation" as an overall limitation.

[13] HUD has *always* read Section 8(c)(2)(C) to set an *overal. limitation* on rents. HUD's very first notice of proposed rulemaking under this statute, issued the same year the statute was passed, proposed a regulation that would treat the comparability mandate as an "overall

that "[a]djustments in the maximum rents as hereinbefore provided *shall not* result in material differences between the rents charged for assisted and comparable unassisted units." The Ninth Circuit, by contrast, has interpreted the statute to mean that adjustments in the maximum rents as provided in Section 8(c)(2)(A) *shall* result in such material differences unless HUD has incorporated the comparability determination into the presumptive formula it uses to set rents.[14]

The Ninth Circuit's argument based on 24 C.F.R. 888.204 is also wholly unpersuasive. That regulation does not implement Section 8(c)(2)(C) at all. It implements Section 8(c)(2)(A), which permits adjustment of rents more

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limitation." 39 Fed. Reg. 40,668 (1974) (§ 1273.103(h)(4)). The final rule, promulgated in April 1975, likewise denominated the comparability mandate an "overall limitation." 40 Fed. Reg. 18,687 (1975) (§ 880.110(d)). An appendix to that final rule was a sample contract, which, like respondents' contracts, requires comparability as an "overall limitation" to be applied notwithstanding any other provision of the contract. *Id.* at 18,705. Section 880.110(d) was recodified in 1979 (see 44 Fed. Reg. 59,428) as 24 C.F.R. 880.609(c), with the "overall limitation" language intact. Although HUD did not enforce the comparability limitation before 1981, there can be no doubt that from the very start HUD has been consistent in *interpreting* Section 8(c)(2)(C) to provide an overall limitation on other provisions of the statute. That longstanding interpretation is entitled to deference under the principles of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-845 (1984), which the court of appeals ignored. HUD's consistent interpretation is, in any event, not only a reasonable construction of Section 8(c)(2)(C) but by far the most natural construction of a statutory mandate of comparability that is not qualified in any way.

[14] To be sure, one can debate in any particular case whether the comparability study *accurately* identifies a material difference between assisted and unassisted rents. But the Ninth Circuit's judgment forbids *all* comparability studies whose effect is to deviate from the AAAFs, no matter how accurate the study may be in any particular case.

frequently than annually, and Section 1.9(b)(1), which allows "interim revisions * * * as market conditions warrant." The regulation corresponding to Section 8(c)(2)(C) is not 24 C.F.R. 888.204, but 24 C.F.R. 880.609(c), which fully supports our position. See note 13, *supra*. To maintain that HUD's regulations coincide with the Ninth Circuit's interpretation, when HUD has so plainly followed a different interpretation for many years, is contrary to the principle that, "[i]n construing administrative regulations, 'the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *United States* v. *Larionoff*, 431 U.S. 864, 872 (1977) (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)); see also *Mullins Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 440 (1987); *Gardebring* v. *Jenkins*, 108 S. Ct. 1306, 1314 (1988).[15]

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[15] Even if we assumed, arguendo, that Section 888.204 represented an interpretation of Section 8(c)(2)(C), the reasoning of the Ninth Circuit would still be wrong. That regulation applies to cases in which the formula-based rent is *too low*, not to cases like this one in which the formula-based rent is too high. More important, the regulation would only show that one way to carry out the comparability mandate would be to incorporate comparability considerations into the formula used for presumptive rent adjustments. Absolutely nothing in Sections 8(c)(2)(C) and 1.9d says that this is the *only* way to carry them out, and that is what is at issue here. Thus, even if HUD had in fact chosen to implement the comparability mandate in one particular way when rents are shown to be too low, that could not remotely support a misreading of the statute to forbid a different, and sensible, way of carrying out the comparability mandate when application of the formula would result in rents that are too high. For all of those reasons, respondents have been equally mistaken, in the courts below, in relying on HUD's 1978 handbook, which contemplates incorporation of a form of "comparability" into the AAAFs when the rents are too low.

In sum, the Ninth Circuit's reading of the statute and the contract as *mandating* incorporation of the comparability limitation into the Section 8(c)(2)(A) formula has no plausible support whatever in the sources on which the Ninth Circuit relied.

b. Other sources to which the Ninth Circuit did not advert further show that comparability studies are a legally permissible basis for limiting AAAF-level rent increases. Over the years since 1981, Congress has been well aware that HUD has used comparability studies to limit the availability of AAAF-level rent increases. Congress has both tolerated and, eventually, affirmatively recognized that practice as being a valid way to carry out the provisions of Sections 8(c)(2)(A) and 8(c)(2)(C). The attitude of recent Congresses toward this practice stands in marked contrast to the view of the court below that HUD can *never* limit AAAF-based rent increases by the independent use of comparability studies.

In 1983, HUD published a controversial set of proposed rules (which, ultimately, were never implemented). 48 Fed. Reg. 52,936. In the proposed rules, HUD would have adjusted rents annually under all Section 8 contracts based on increases in *costs* for comparable rental units.[16] In early 1984, the Subcommittee on Housing and Community Development of the House Committee on Banking, Finance and Urban Affairs held a hearing specifically focused on that proposal. *1984 Hearing, supra.* Some

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[16] HUD was, before 1988, statutorily authorized to do this for contracts entered into on or after October 1, 1981. 42 U.S.C. 1437f(c)(2)(D); see 42 U.S.C. 1437f note (effective date); 12 U.S.C. 3701 note (same). But see Pub. L. No. 100-242, § 142(e), 101 Stat. 1850 (repealing Section 8(c)(2)(D)). The proposed rules would have applied that methodology to contracts entered into before October 1, 1981.

harsh words about that proposal appear in the published hearing, including the opening remarks of the subcommittee chairman. *Id.* at 1-2. In the courts below, respondents have cited those remarks as evidence that Congress had the same view of the statute as the one that has now been adopted by the Ninth Circuit. The hostile language respondents have cited, however, has nothing to do with the issue here because the hearing focused on the 1983 proposed rules and their extension of *cost-based* comparability determinations to pre-1981 contracts. Although the hearing contains substantial commentary on the general question whether limitation of AAAF-level rent increases because of *rent-based* comparability studies is proper, that was not the subject of the hearing and was not the subject of most of the criticism of HUD in the hearing.

The discussion of *rent-based* comparability studies at the hearing is in fact quite instructive. Respondent Kurtis Mayer and his counsel testified in opposition to HUD's existing use of comparability studies, referring specifically to this lawsuit, which "a group of builders ha[d] financed" (*1984 Hearing, supra,* at 6), and to an alleged promise "that annual rent adjustments would be made automatically on the basis of the Consumer Price Index" (*id.* at 12; see also *id.* at 84).[17] Counsel, however, deferred to "Mr. Edson who has more familiarity with the background of the program than I have." *Id.* at 12.

Charles L. Edson, Counsel for the National Leased Housing Association, was the next witness. Edson was sharply critical of the 1983 proposed regulations. His more

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[17] The General Counsel of HUD, John J. Knapp, testified at the hearing and made clear at the outset of his testimony that the complaints that Mayer and his counsel had aired were different from the complaints about the cost-based rule that was the subject of the hearing. *1984 Hearing, supra,* at 99.

general comments on the role of "comparability" under the statute and contracts, however, were more favorable:

> [I]n structuring section 8, Congress meant it to be a market program. Rents would rise by either the fair market rents in the area, or a reasonable formula which as our legislative history shows was the CPI, *but there was a cap, a market discipline cap, and that is where comparabilities came in. Rents could not exceed the rents of a comparable project in the area. It was a well thought through mechanism.*
>
> * * * HUD was very anxious to get it off the ground and it pointed out to developers at many meetings throughout the country of this marvelous rent devise [*sic*], of this escalation procedure where there would not be a cost review, but instead you would just go up by the market index *capped only by comparability.*

1984 Hearing, supra, at 21 (emphasis added). Edson's prepared statement made the same point:

> HUD made much of the "automatic annual adjustment" for rents, *with the only limitation being that Section 8 rents could not exceed comparable unassisted rents.*

Id. at 27 (emphasis added); see also *id.* at 38, 39. In later colloquy, the same witness noted that "comparability has been enforced with a vengeance since 1979 [*sic*] and has kept the rents at a reasonable level at the market rate. That is what the statute intended. That is a good mechanism." *Id.* at 84. Mr. Edson's remarks are of some significance, because he is a leading practitioner in this field, and his client organization was closely involved in the drafting of the statute. See *id.* at 21.

This subsequent legislative history may provide little insight into the thinking of the 1974 Congress, but it does, at

a minimum, refute the Ninth Circuit's claim that the preexisting statute and form contracts "unambiguously" forbid the implementation of the comparability mandate through any method other than incorporation into the AAAFs. If a leading representative of the housing industry itself thought HUD's practice of performing comparability studies was exactly what the statute contemplated, it is hard to see how the Ninth Circuit can hold that that is something the statute (or contract) unambiguously forbids.

Moreover, Congress's awareness of the administrative practice[18] takes on added significance in light of the 1988 amendments to Section 8. Those amendments concededly reflect displeasure at *some features* of HUD's implementation of Section 8. As to the question presented here, however, they clearly assume the validity of case-by-case comparability studies as a means of limiting rent increases. Specifically, in 1988, in Pub. L. No. 100-242, § 142(c)(2)(B) and (d), 100 Stat. 1850, Congress has added the following two sentences to the end of Section 8(c)(2)(C):

> If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied. The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moder-

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[18] Congress was aware of that practice not only because of the live testimony at the hearing but also because HUD submitted, and the committee published as an appendix to the hearing, the opinion of the district court in this case upholding the use of comparability studies. *1984 Hearing, supra,* at 151-159.

> ately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner.

The first of those two sentences would be a complete absurdity under the Ninth Circuit's interpretation of the statute. If Congress had intended in 1974 to forbid the use of comparability studies altogether, there would obviously be no point in enacting a statute 14 years later that merely regulates the *timing* of such studies. The second sentence forbids year-to-year *reductions* in rents, *i.e.*, decreases of rents below those allowed in a prior year. Far from contradicting the basic idea that comparability studies are a legitimate way to limit AAAF-level rent *increases*, however, that provision merely decries the practice of *decreasing* rents based on comparability studies.[19] Thus, although Congress was not pleased with certain features of HUD's implementation of Section 8, the text of

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[19] When it enacted the Sec. 8 program, Congress intended that rents for project-based assisted projects would be *reduced* only if the published Automatic Annual Adjustment Factor ("AAAF") was negative; reflecting a noticeable general downturn of rents in the market area. Although no negative adjustment factors have been published to date, HUD field offices have been making capricious individualized rent *reductions* nonetheless. Further, such reductions and other rent limitations have been made on an ad hoc and arbitrary basis in the absence of published procedures that could assure a consistent policy. To eliminate these arbitrary practices not justified under current law, Sec. 142(d) [the provision adding the *second* new sentence to Section 8(c)(2)(C)] prohibits *reductions* in rents in effect on or after April 15, 1987, unless the project has been refinanced and the monthly mortgage payments have been reduced.

H.R. Rep. No. 122, 100th Cong., 1st Sess. 32 (1987) (emphasis added).

the 1988 amendments unquestionably assumes that comparability studies *will* be used to limit AAAF-level rent increases.

When one focuses on the precise question presented—whether comparability studies are a permissible means of limiting AAAF-level rent increases—rather than the general issue of whether Congress has been pleased or displeased with other aspects of HUD's administration of Section 8, it is clear that the record is favorable to the government's position. As this Court has observed, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *CFTC* v. *Schor,* 478 U.S. 833, 846 (1986). The subsequent legislative history confirms what is obvious from the text of the statute and contracts themselves: the decision of the court of appeals is untenable.

2. The incorrect ruling of the Ninth Circuit deserves review by this Court. Although there is no conflict in the circuits, the combined fiscal importance and programmatic importance of the decision fully satisfy this Court's standards for a grant of certiorari.

The decision of the court of appeals is seriously wrong, not only as a strict legal matter but also from the standpoint of public policy. There is no conceivable substantive reason why Congress would have wished to disable HUD from checking particular formula-based rents to see whether they are in fact comparable to market rents. A promise that rents will increase over time *above* market rents has never been considered necessary to attract and retain project owners in the Section 8 program, and is in any event exactly what Section 8(c)(2)(C) would plainly

forbid even if for some reason HUD thought it desirable. According to the Ninth Circuit, however, HUD completely lost any right to prohibit above-market rent increases once it set the AAAFs at levels designed to deal with the general case rather than with each specific case. If the Ninth Circuit's decision is applied retroactively, as there is every indication it would be if not reversed, then scores of project owners within the Ninth Circuit will be entitled to recover millions of dollars in back rent completely without regard to whether the rents they would have received through automatic application of the AAAFs are or are not comparable to rents for unassisted units. The effect of the ruling would be to confer on owners of Section 8 housing a substantial windfall that serves no conceivable statutory purpose.

The magnitude of the financial impact of the decision below on the government and the persons it serves is also sufficiently grave as to warrant this Court's attention. As noted above, HUD estimates the potential retroactive liability under that decision to be $50 million within the Ninth Circuit and more than $200 million if the decision were applied nationwide. Those funds either must be provided at the expense of future low-income tenants who may suffer because HUD's budgetary resources have been diverted for the benefit of landlords, or must be borne by federal taxpayers, or both.

The potential financial impact of the decision below is not limited to its retroactive effect. The decision below is so cryptic and internally inconsistent that, if not reversed, it casts serious doubt on the extent to which HUD can *ever* mitigate its impact. The court of appeals acknowledged that "[t]he overall limitation provision * * * clearly authorizes modifications of the formula applied to keep assisted rents in line with market rents" (App., *infra*, 7a), but it also insisted that "[t]he overall limitation provision

* * * does not permit HUD * * * to adjust rents solely on the basis of a market survey" (*id.* at 6a). Given that HUD must necessarily determine what the market rents are in order to keep particular rents "in line with market rents"—in other words, that *only* a market survey can possibly tell HUD whether particular rents are "in line"—the Ninth Circuit's assertion that no adjustment can ever be made *solely* on the basis of such a survey leaves HUD at sea in determining what role a market survey *can* play. If the Ninth Circuit were to enforce its decision in this case by precluding *all* use of comparability studies to cap rents, whether the studies are published as part of the AAAFs or not, then HUD would have very little power to mitigate the future financial impact of the Ninth Circuit's decision, and *no* power to assure that, in the individual case, application of the AAAFs will "not result in material differences between the rents charged for assisted and comparable unassisted units," as required by Section 8(c)(2)(C). The result would be tens or even hundreds of millions of federal dollars lost to above-market rents that, we submit, Congress never contemplated. Before a loss of that magnitude is imposed on low-income tenants or federal taxpayers, this Court's review is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-3685
D.C. No. CV-83-997-R

RAINIER VIEW ASSOCIATES, A WASHINGTON LIMITED PARTNERSHIP; KURTIS R. MAYER AND PAMELA MAYER, DBA/MAYER BUILT HOMES, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted
May 5, 1987—Seattle, Washington
Submission Vacated June 1, 1987
Resubmitted March 7, 1988

Filed June 6, 1988

Before: BETTY B. FLETCHER, ROBERT BOOCHEVER AND WILLIAM A. NORRIS, Circuit Judges.

Per Curiam

OPINION

PER CURIAM:

In this action for declaratory relief, we consider a question of contract interpretation concerning the method by which the United States Department of Housing and Urban Development ("HUD") may alter its method of calculating annual rent adjustments for government-assisted housing projects. The district court granted summary judgment in favor of the United States and against Rainier View Associates (Rainier), a developer and owner of Section 8 housing. We reverse.

I

Around 1974, pursuant to the enactment of Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437f, HUD implemented a program to encourage the private sector to build rental housing for low-income people. HUD solicited private developers to submit bids to construct specialized housing at specific locations. Successful bidders were awarded Housing Assistance Payment (HAP) contracts, either directly or through local public housing agencies as the contract administrators. Under the HAP contract, the developer/owner collects a portion of the contract rent directly from the tenant, while the remainder is paid to the owner by HUD through the contract administrator.

Section 8(c)(2)(A) requires that the HAP contract provide for periodic adjustment of the maximum monthly rent (and thus of HUD's contribution) "to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. § 1437f(c)(2)(A). Section 8(c)(2)(C)

places a limitation on the permissible adjustments so that they "shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U.S.C. § 1437f(c)(2)(C).

Section 1.9 of the HAP contract at issue in this case contains provisions designed to carry out the mandates of section 8(c)(2):

> . . .
>
> b. *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. . . .
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.
>
> . . .
>
> d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

On April 9, 1980, Rainier executed a HAP contract for a term of twenty years with the Housing Authority of the City of Bremerton (Bremerton). In 1981 and 1982, Bremerton granted Rainier annual rent adjustments for its Section 8 housing project based upon HUD's published Automatic Annual Adjustment Factors (AAAFs). However, in 1983, Bremerton refused to grant Rainier the annual adjustment that would have resulted from the application of the AAAFs published by HUD in the *Federal Register* on January 20, 1983. Instead, Bremerton insisted that Rainier conduct a rent study of the housing in the project's vicinity in order to justify any adjustment in the maximum rent allowance. Rainier refused and commenced this action in the district court, seeking a declaratory judgment that under the HAP contract, it was entitled to an automatic annual adjustment based on the latest published AAAFs.

The district court granted summary judgment for HUD, ruling that as a matter of law the HAP contract unambiguously permits HUD (in this case through its agent, Bremerton) to withhold the annual rent adjustment outlined in section 1.9b when such an adjustment would violate the overall limitations provision in Section 1.9d. Rainier appealed.

II

A grant of summary judgment is reviewable *de novo*. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). Federal law controls when interpreting a government contract. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 464 U.S. 892 (1983). The interpretation of a contract presents a mixed question of law and fact. When, as here, the district court's decision is based on analysis of the

contract language, the decision is reviewed de novo. *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985).

Section 8(c)(2)(A) allows adjustments based either on market surveys, "or, if the Secretary determines, on the basis of a reasonable formula." Rainier contends that in Section 1.9b of the HAP contract HUD *elected* to rely exclusively on the AAAF formula process, instead of on an individualized "market survey" method. By switching to an individualized "market survey" method, Rainier argues, HUD reneged on its obligation. Rainier explains that the "overall limitation" in Section 1.9d is a limitation on HUD's calculation of the AAAFs. Accordingly to Rainier, the clause may *not* be construed as providing HUD with an independent basis for refusing to apply the published AAAFs. Rainier argues that by invoking the "overall limitation" provision as an independent basis for adjusting the maximum allowable rent, even though the latest published AAAFs show that a greater adjustment is indicated, HUD is seeking to nullify its election.

HUD counters that Section 1.9d of the HAP contract authorizes the government to limit adjustments that would occur through the use of the AAAF formula when use of that formula would result in a material difference between the rents charged for assisted and comparable unassisted housing. HUD argues that the language of Section 1.9d, which provides, "Notwithstanding any other provisions of this contract, adjustments as provided in this Section shall not result in material differences between rents charged for assisted and comparable unassisted housing units . . . ," authorizes HUD to override the formula process for determining rent adjustments.

HUD misconstrues the role of the overall limitation. The overall limitation provision in section 1.9d, consistent with its statutory analog, Section 8(c)(2)(C), is clearly a

limitation on the calculation of the formula used to adjust rents, not an independent basis for making annual rent adjustments. Under the statute, HUD could choose either a market survey method (described in the first clause of Section 8(2)(A)) *or* a formula method (described in the second clause of Section 8(2)(A)). In the contract, HUD elected the formula method. Having made its choice, HUD cannot now change its mind. The overall limitation provision of the statute and the contract permit HUD to adjust the formula factors in light of market conditions, but it does not permit HUD to abandon entirely the formula method it chose and to adjust rents solely on the basis of a market survey. HUD's interpretation of the overall limitation provision would render the formula method authorized by the statute and elected in the contract a nullity. It would make all rent adjustments depend on the market survey method.

Not only is HUD's interpretation of Section 1.9d of the contract foreclosed by the contract language, it is inconsistent with the role of the overall limitation provision described in the regulations. 24 C.F.R. § 888.204 (1987) provides that

> "[i]f the application of the Annual Adjustment Factors results in rents that are substantially lower than rents charged for comparable units not receiving assistance . . . , in the area for which the factor was published or a portion thereof, and it is shown to HUD that the costs of operating comparable rental housing have increased at a substantially greater rate than the Adjustment Factors, the HUD Field Office will consider establishing separate or revised Automatic Annual Adjustment Factors for that particular area."

Thus, HUD's own regulations interpret the overall limitation provision in the statute the same way we interpret the overall limitation provision in the contract—as permitting adjustment of the AAAFs, not abandonment of the formula method whenever application of the formula would result in a disparity between section 8 and other rents.

In sum, the contract clearly elects the formula method, one of two statutorily authorized methods for calculating rent adjustments. The overall limitation provision just as clearly authorizes modifications of the formula applied to keep assisted rents in line with market rents. What the overall limitation provision does *not* do is permit HUD to switch from one method to another. That is clear from the contract language, and is consistent with the statutory language and HUD's own regulations interpreting the statute. We thus hold that the contract unambiguously support Rainier's interpretation. Accordingly, the district court erred in denying Rainier's motion for summary judgment and in granting summary judgment in favor of HUD.

Rainier's request for its attorneys' fees on appeal pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), should be considered by the district court.

The judgment of the district court is

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C83-997R

RAINIER VIEW ASSOCIATES, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed Feb. 28, 1984]

ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT

THIS CASE is before this court on cross motions for summary judgment. Plaintiff, Rainier View Associates, brought this suit seeking a declaratory judgment that under its Housing Assistance Payment Contract (hereinafter HAP Contract), it is entitled to automatic rent allowance adjustments using factors based upon the Consumer Price Index (hereinafter CPI) for rents and utilities. Defendant United States, acting through the Department of Housing and Urban Development (hereinafter HUD), has moved for summary judgment on the ground that since the United States Claims Court has exclusive jurisdiction over plaintiff's claims, this court lacks subject matter jurisdiction. Plaintiff has also moved for summary judgment on its claim for automatic rent allowance adjustments as is more fully discussed below. Having reviewed the parties' motions, memoranda and supporting materials, together with the records and files herein, the court finds and rules as follows:

I. BACKGROUND

The facts are essentially undisputed. On April 9, 1980 plaintiff executed a HAP Contract with the Housing Authority of the City of Bremerton. Under that contract, plaintiff built, owned and leased apartemnts for low income elderly tenants. Plaintiff's HAP Contract is for a term of twenty years. The Contract was entered into pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437(f) *et. seq.* (hereinafter Housing Act). Under the Section 8 Program, HUD establishes allowable rents. A portion of the rent is collected by the owner from the tenant and the difference between the allowable rents and the tenant's share is paid directly to the owner by HUD.

Under the HAP Contract allowable rents are adjusted annually based on factors determined by HUD. In 1975 HUD adopted procedures for adjusting allowable rents based upon factors published annually in the *Federal Register.* 24 C.F.R. § 888, Subpart B. In 1976 HUD published rent adjustment factors, or Automatic Annual Adjustment Factors (hereinafter AAAFs), which were based upon the CPI for rents and utilities. In subsequent years, the AAAFs published by HUD continued to use the CPI as their basis for rent adjustments. However, in 1982 and 1983, the published basis for determining the AAAFs was changed by HUD to a combination of the CPI and the 1979 Annual Housing Survey (hereinafter AHS). Plaintiff claims that including the AHS as a factor tends to yield lower allowable rents than if the CPI was the sole factor.

In 1983 the Seattle Area Office of HUD refused to give plaintiff the annual adjustment that was indicated by application of the CPI and AHS-based AAAFs published in the *Federal Register* by HUD on January 20, 1983. Plaintiff claims that the Seattle Area Office had no authority to

refuse to automatically adjust its rent levels. Plaintiff argues that while it objects to the use of the CPI and AHS in determining the AAAFs, it was nonetheless entitled to an automatic rent increase of 10.0% under the very AAAFs published by HUD.

In its motion for summary judgment, plaintiff seeks a judgment declaring that its HAP Contract requires the Government to automatically adjust plaintiff's allowable rent levels using AAAFs based solely on the CPI. Plaintiff claims the Government's decision in 1982 and 1983 to use the AHS as well as the CPI as the basis for calculating the AAAFs was a violation of its HAP Contract. Plaintiff further claims that the Government's decision in 1983 not to adjust its allowable rent levels as indicated by the 1983 AAAFs was a violation of its HAP Contract.

The Government argues that plaintiff's claim should be dismissed for lack of subject matter jurisdiction because 28 U.S.C. § 1491(a)(1) grants the United States Claims Court exclusive jurisdiction over monetary claims against the Government in excess of $10,000.

II. JURISDICTION

The United States Claims Court has jurisdiction to decide claims "against the United States founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). This jurisdiction does not extend to claims solely for declaratory relief and, thus, a claim for monetary damages is required before jurisdiction vests in the Claims Court. *United States v. King,* 395 U.S. 1, 5 (1969); *Cape Fox Corp. v. United States,* 646 F.2d 399, 402 (9th Cir. 1981). While plaintiff's claim clearly involves an "express or implied contract with the United States," the issue before the court

is whether the relief sought by plaintiff involves money damages or whether it is exclusively declaratory in nature.

The Government argues that even though plaintiff is not seeking damages, its claim must be characterized as one seeking money from the government because if plaintiff prevails on the merits of its claim, plaintiff would be entitled to additional money from the government and because "plaintiff's only conceivable purpose for this lawsuit is to obtain additional money from the government." The cases relied upon by the Government are inapposite. In each of those cases, the contract obligations were fully performed and a declaratory judgment would have been equivalent to a finding of money damages. In those cases declaratory judgment served no purpose other than declaring the liability of the government. *See, e.g., Kester v. Campbell,* 652 F.2d 13 (9th Cir. 1981); *Cape Fox Corp. v. United States,* 646 F.2d 399 (9th Cir. 1981).

The instant case is clearly distinguishable. Plaintiff's contract with the Government is for a term of twenty years, the greater portion of which is yet to be performed. The effect of a declaratory judgment would be to declare the rights and obligations of the parties under the HAP Contract for the remainder of the term. This case is similar to *Laguna Hermosa Corp. v. Martin,* 643 F.2d 1376 (9th Cir. 1981), in which the plaintiff requested a declaration that it possessed rights against the United States without seeking money damages for breach of these rights. In finding jurisdiction was proper in the district court, the court stated: "A district court does not lose jurisdiction over a claim for nonmonetary relief simply because it may later be the basis for a money judgment." *Id.* at 1379.

This court has jurisdiction over the subject matter of plaintiff's claim. The Government's motion for summary judgment is therefore DENIED.

III. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff contends that the Government's use of the CPI as the sole basis for determining AAAFs prior to the execution of its contract and during the first year of its contract, obligates the Government to continue using only the CPI to determine AAAFs. Plaintiff concedes that the Government did not represent to plaintiff that it would never change the basis for computing AAAFs. Plaintiff further claims that under the terms of its HAP Contract it is entitled to annual rent adjustments which are automatic.

The Government argues that the terms of the HAP Contract do not provide for annual rent adjustments which are automatic. The Government also argues that the Housing Act, 42 U.S.C. § 1437(c)(2), provides it with discretion to determine the basis of rent allowance adjustments, and that this discretion was not limited by the terms of plaintiff's HAP Contract.

Where, as here, a contract unambiguously states the obligations of the parties, interpretation of the contract is a matter of law which can be determined on a motion for summary judgment. *Beck Park Apartments v. United Department of Housing and Urban Development,* 695 F.2d 366, 371 (9th Cir. 1982).

Section 8(c)(2)(A) of the Housing Act, 42 U.S.C. § 1437(c)(2)(A), provides for annual or more frequent adjustments in the maximum monthly rents for units covered by HAP contracts to reflect changes in fair market rentals. The Secretary of HUD has discretion to determine these adjustments on the basis of a reasonable formula. *Id.* Application of the formula determined by the Secretary may not, however, result in material differences between the rents charged for assisted and comparable unassisted units. 42 U.S.C. § 1437(c)(2)(C). Furthermore, the regulations implementing the AAAFs, 24 C.F.R. § 888.202, do

not prescribe what basis is to be used to determine the AAAFs. They provide only that the AAAFs are to be published in the *Federal Register*.

Nothing in plaintiff's HAP Contract suggests that the Government intended to limit the discretion granted it by Section 8(c)(2) of the Housing Act. In fact, the terms of plaintiff's HAP Contract mirror the statutory language. Section 1.9b(1) and (2) of plaintiff's contract provides for the annual determination by the Government of AAAFs and for the adjustment of contract rents on each anniversary date of the contract. The contract rents are to be adjusted by applying the applicable AAAF most recently published by the Government. However, Section 1.9d provides that notwithstanding other provisions of the contract, adjustments provided for under Section 1.9 shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government.

The term "automatic" in Section 1.9 of plaintiff's HAP Contract refers to the use of the AAAFs formula to automatically determine plaintiff's deemed need for rent adjustments rather than by the use of the case by case method provided in Section 1.9(c). To hold that plaintiff is entitled automatically to annual rent adjustments would be contradictory to the language in Section 1.9(d) providing an overall limitation on adjustments arrived at under Section 1.9. Thus, plaintiff's contention that the Seattle area office of HUD lacks authority to refuse to adjust plaintiff's rent levels automatically is without merit. This authority is clearly provided in Section 1.9(d) of plaintiff's HAP Contract.

Plaintiff's HAP Contract is a public, not a private contract. Consideration of the contract against the backdrop of the Housing Act is, therefore, appropriate. *Beck Park*, 695 F.2d at 370. The Housing Act provides the Secretary

of HUD with the discretion to determine a "reasonable formula" by which rent allowance adjustments are to be made. Plaintiff's HAP Contract does not provide any limitation on what basis is to be used in the determination of the AAAFs nor does it obligate the Government to use a particular basis. Plaintiff does not present this court with any evidence indicating that the Government under the HAP Contract intended to limit the discretion granted it by the Housing Act. Even if this court were to hold that the Government can be estopped, plaintiff has not established that the Government's use of a CPI-based AAAF during only the first year of its HAP Contract creates a "past practice" or "course of performance" that would obligate the Government to its continued use. Even if HUD's action was a deviation from past practice, it does not follow that the Government has breached the agreement. *Beck Park,* 695 F.2d at 371. Furthermore, HUD's failure to use a basis other than the CPI prior to 1982 does not mean that HUD forfeited or surrendered its rights. *Beck Park,* 695 F.2d at 371. Rather, HUD's use of a CPI-based AAAF for the first year of plaintiff's HAP Contract followed by the use of a combined CPI and AHS based AAAF for the second and third years of the contract was an exercise of the discretion granted it by the Housing Act.

Thus, plaintiff's claim that it is entitled to annual adjustments which are automatic and based exclusively upon the CPI is not supported by the contract language or by Section 8(c)(2) of the Housing Act. The court notes that plaintiff challenges only the authority of HUD's Seattle Area Office to refuse to automatically grant it the rent allowance adjustment indicated by application of the AAAF. Plaintiff does not address the issue of the validity of the process by which the Seattle Area Office determined that plaintiff was not entitled to a rent allowance increase.

Plaintiff's motion for summary judgment must be denied. In the course of so doing, the court has rendered its declaratory judgment as to the rights of the parties. There being no further issues before the court, this action is hereby DISMISSED.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 28th day of February, 1984.

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C83-997R

RAINIER VIEW ASSOCIATES, A WASHINGTON LIMITED PARTNERSHIP, AND KURTIS R. MAYER AND PAMELA MAYER D/B/A MAYER BUILT HOMES, PLAINTIFFS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AND THE HOUSING AUTHORITY OF THE CITY OF BREMERTON, DEFENDANT

[Filed Jan. 15, 1986]

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT FOR PLAINTIFFS

THIS MATTER comes before the court on a motion by defendant United States of America for summary judgment. Having considered defendant's motion together with all memoranda, affidavits, exhibits and supporting documents filed in support of and in opposition to the motion, having heard oral argument, and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

This case involves a challenge by plaintiffs Rainier View Associates ("Rainier View") and Kurtis R. and Pamela

Mayer d/b/a Mayer Built Homes ("Mayers") to the administration by the Department of Housing and Urban Development ("HUD"), an agency of defendant United States of America, of a program under Section 8 of the Housing Act of 1937 as amended, 42 U.S.C. § 1437f ("Section 8").

Section 8 authorizes the payment of rent subsidies by the federal government on behalf of lower-income families living in private housing. HUD implements this legislation through, *inter alia,* the Section 8 Housing Assistance Payments ("HAP") Program for New Construction. *See* 24 C.F.R. Part 880.

Under the program, the private owner of the new construction project enters into a HAP contract with the contract administrator, which is either HUD or a public housing agency through which HUD operates. That contract sets forth the maximum rent to be charged for each housing unit. The owner collects a portion of the rent directly from the tenant, while the remainder is paid to the owner by the contract administrator.

The controversy in this case focuses on the question of annual adjustments to the rents established in plaintiffs' HAP contracts. The Housing Act, 42 U.S.C. § 1437f(c)(2)(A) and (C), provides as follows with regard to Section 8 New Construction HAP contracts entered into prior to October 1, 1981, which is the situation here:

> (A) The [HAP] contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rents established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.
>
> * * * * *

> (C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary.

The pertinent regulation at the time of the instant controversy, 24 C.F.R. § 880.609, states as follows with respect to adjustment of rents:

> (a) Automatic Annual Adjustment of Contract Rents. Upon request from the owner to the contract administrator, contract rents will be adjusted on the anniversary date of the contract in accordance with 24 CFR Part 888.
>
> * * * * *
>
> (c) Overall Limitation. Any adjustments of contract rents for a unit after Contract execution or cost certification, where applicable, must not result in material differences between the rents charged for assisted units and comparable unassisted units except to the extent that the differences existed with respect to the contract rents set at Contract execution or cost certification, where applicable.

Subpart B of 24 C.F.R. Part 888, which is referred to in § 880.609(a), concerns Contract Rent Automatic Annual Adjustment Factors. Put simply, this subpart states that Automatic Annual Adjustment Factors ("AAAFs") will be computed each year, published in the Federal Register and used to adjust rents under the Section 8 HAP Program.

Turning to the specific situations involved here, plaintiffs Mayers entered into a contract with HUD in 1976 concerning the Stockton project, a number of a single-family detached dwellings located in King County, Washington. The contract relating to that project provides in part:

1.8 *RENT ADJUSTMENTS.*

a. *Funding of Adjustments* Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this Section, up to the maximum authorized under Section 1.5a of this Contract.

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

* * * * *

d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided, that

this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

e. *Incorporation of Rent Adjustment.* Any adjustment in Contract Rents shall be incorporated into Exhibit A by a dated addendum to the exhibit establishing the effective date of the adjustment.

From 1976 through 1980, the Seattle HUD Area Office, which was in charge of administering the Mayers' Section 8 HAP contract, adjusted rents for the Stockton project in keeping with the AAAFs published annually in the Federal Register. Then in 1981, the Director of Housing for the Seattle HUD Area Office notified owners of Section 8 projects, including the Mayers, of his decision to perform comparability studies for projects in the Seattle Standard Metropolitan Statistical Area ("SMSA") in order to determine whether adjustment using the AAAFs would result in excessive rents. These studies involved a comparison between the rents charged for project dwellings and for "comparable unassisted units." In late 1982, the Director of Housing notified project owners that, with certain exceptions, he intended to perform comparability studies on Section 8 New Construction projects located in suburban Seattle, Everett and South Snohomish County, Pierce County and the Tri-Cities.

In March of 1983, a comparability study was performed on the Stockton project. Pursuant to the results of that study, the Mayers were informed by the Seattle HUD Area Office that they had to reduce their rents from the existing levels of $517 for three-bedroom units and $555 for four-bedroom units to $447 and $530 per month, respectively.

The Mayers appealed this determination. E. J. Moger, then Area Manager for the Seattle Area HUD Office, conducted an informal hearing in July of 1983 and heard testimony from a private real estate appraiser hired by the Mayers who performed his own comparability study. In August of 1983, Moger informed the Mayers of his decision that the maximum allowable rents for the Stockton project for the period from December 1, 1982 through November 30, 1983 would be $472 for three-bedroom units and $550 for four-bedroom units. Notwithstanding Moger's decision, the HUD Office did not change the rent stated in the Stockton contract or reduce the rent subsidy paid for the relevant period. However, neither were the Stockton project rents increased for that period in accordance with the published AAAFs. In August of 1984, the Mayers filed suit.

Rainier View, the other plaintiff in this case, owns the Rainier View project, a number of apartments for low-income elderly tenants. In April of 1980, Rainier View entered into a HAP contract with the Housing Authority of the City of Bremerton which contained the same provisions concerning rent adjustments as the Stockton project HAP contract. In 1981 and 1982, Ray Dally, owner of Rainier View, received the notices described above from the Director of Housing for the Seattle HUD Area office concerning his decision to perform comparability studies. Then, in 1983, Dally was informed by the Bremerton Housing Authority, Rainier View's contract administrator, that he himself would be required to perform a study on the Rainier View project. Dally refused to do so. Rainier View filed the instant suit in July of 1983 for a declaratory judgment that it was entitled to automatic annual adjustments of the contract rents pursuant to the Housing Act and the HAP contract with the Bremerton Housing Authority.

In May of 1984, this court ruled that, contrary to the position taken by Rainier View, the contract administrator did not have to apply the AAAFs each year and that it could decide to apply the overall comparability limitation.

The Mayers' case has been consolidated with the Rainier View case. Given the court's prior ruling that the contract administrator does not have to apply the AAAFs each year, the only issues remaining are those concerning the validity of the manner in which HUD applied the comparability limitation. Defendant United States ("the government") has now moved for summary judgment as to all of those issues.[1]

II. LEGAL ARGUMENT

A. Ripeness and Mootness

The government first argues that the remaining claims in Rainier View should be dismissed for lack of ripeness because there is no case or controversy within the meaning of Article III of the United States Constitution. These claims include Rainier View's requests for declaratory judgment that "[i]f HUD has the authority to . . . disregard the published basis for rent increases, HUD must do so in conformance with proper procedures under applicable laws, rules and regulations," and "in accordance with procedures which are fair and uniform throughout the United States," and that "HUD must at least allow the same percentage difference over so-called market rents as

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[1] Shortly after Rainier View filed suit, defendant Housing Authority of the City of Bremerton stipulated to entry of an order of default against it on the grounds that it had no interest in the litigation other than as a conduit for HUD. The order further stated that the Housing Authority would abide by any declaratory judgment entered in the case on the condition that no fees or costs be assessed against it.

it did in originally establishing contract rents." Rainier View Complaint, ¶¶ 10.3–10.5.

The government contends that these claims are not ripe because, in the case of Rainier View, no comparability study was ever done. About three months after it was informed of the necessity for such a study, Rainier View filed suit in this court and the whole matter was held in abeyance pending the outcome of the action. Then, despite the court's grant of summary judgment for the government on the issue of the automatic applicability of the AAAFs, HUD granted Rainier View a retroactive rent increase in accordance with the AAAFs on the grounds that no comparability study had ever been done.

In *Abbott Laboratories v. Gardner, Secretary of Health, Education and Welfare,* 387 U.S. 136 (1967), the United States Supreme Court set forth two factors which courts should assess in determining whether a claim is ripe: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding consideration. Having carefully examined Rainier View's situation in light of these factors, the court agrees with the government that HUD's method of actually implementing the comparability limitation on rent increases is not ripe for review as to the Rainier View project because no comparability study was done, and it is entirely speculative whether HUD will ever apply the comparability limitation to Rainier View in the future. However, the issue of HUD's method of selecting the Section 8 projects which must undergo comparability studies is ripe for review because Rainier View was subjected to that part of the process.

Rather than responding to the government's argument on ripeness, Rainier View chooses to view the real issue as one of mootness. As the ruling above indicates, the court concludes that the government's contention has some merit. But the court also agrees with Rainier View's posi-

tion that its case is not moot. First, there remains the issues of HUD's method of selecting Rainier View for a comparability study. Second, although HUD did decide to grant Rainier View a retroactive rent increase pursuant to the AAAFs, it did not pay any interest on that amount. Finally, there may also be a question concerning recovery of attorney fees. Because the issues of Rainier View's entitlement to interest and attorney fees have not been briefed, the court will not consider them at this time, but they do remain in the case.

B. Jurisdiction

Concerning the Mayers' case, the government argues that the Court of Claims has exclusive jurisdiction because, regardless of their requests for declaratory relief, what the Mayers really want is monetary relief of more than $10,000. This argument was addressed and rejected as to Rainier View in the court's prior Order Re Cross Motions for Summary Judgment of February 28, 1984 at pp. 4-5. Likewise, the issues now before the court involve requests for declaratory judgments about the legality of HUD's methods and procedures and, therefore, are definitely matters not within the jurisdiction of the Court of Claims. *Cape Fox Corp. v. United States,* 646 F.2d 399, 402 (9th Cir. 1981).

The government further contends that even if the Court of Claims does not have exclusive jurisdiction over this case, this court lacks jurisdiction because the government has not waived sovereign immunity. The government concedes the existence of 5 U.S.C. § 702 of the Administrative Procedure Act ("APA"), which states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

However, the government argues that, pursuant to 5 U.S.C. § 704, only "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." The government contends that the Court of Claims could provide an adequate remedy if the Mayers had brought their suit there by framing the complaint as one for damages. This argument has no merit. The procedural issues which the Mayers and Rainier View are litigating now squarely call for declaratory judgments which the Court of Claims does not have the jurisdiction to give.

C. Lack of Procedures Governing Use of Comparability Limitation

In their complaint, the Mayers challenged HUD's failure to follow rulemaking procedures concerning the applicability of the comparability limitation as set forth in 24 C.F.R. 10 and 15.11, 5 U.S.C. § 553, and 5 U.S.C. § 552(a)(1). Mayers' Complaint, ¶¶ 7.6-7.9. They also alleged that "HUD's new policy and procedures [regarding the comparability limitation] are arbitrary and unfair," "have been applied arbitrarily, unfairly and inconsistently," and "are not followed uniformly even within the Seattle Area Office, much less across the United States." *Id.*, ¶¶ 7.10-7.12. In its complaint, Rainier View requested a declaratory judgment that HUD must apply the comparability limitation in accordance with fair and uniform procedures.

Given the broad and conclusory nature of this language, it was not immediately obvious what precisely plaintiffs found reprehensible. But as a result of the briefing on the motion under consideration and the oral argument held on that motion, it has become clear that, while plaintiffs do challenge certain specific aspects of the procedure which

HUD followed and the decision which HUD reached about the application of the comparability limitation to the Stockton project, their more fundamental complaint concerns the lack of any standards to guide administrators.

There is no dispute that the Housing Act is silent on the issue and that HUD lacks any regulations or established plans or guidelines for exercising its discretion in administering the comparability limitation. The parties stipulated to the fact that "HUD Headquarters has never issued to all field officers any handbooks, notices or other documents explaining when or how to conduct the comparability surveys, other than a memorandum dated January 7, 1985."[2] Stipulation on Certain Admitted Facts, March 6, 1985 at p. 3.

The parties further stipulated to the following facts, which reveal a pattern of haphazard enforcement of the comparability limitation:

> 5. A survey performed by the Office of Inspector General of HUD during the period July 10, 1981 to September 20, 1982, covering Regions I, IV, V, and VIII disclosed that in seven of the eight field offices reviewed, comparabiility studies were not performed.

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[2] In this memorandum from Maurice L. Barksdale, Assistant Secretary for Housing-Federal Housing Commissioner, he instructed all field office directors of Housing Development and Housing Management Divisions that, in selecting comparable unassisted units for purposes of conducting comparability reviews, they must use the same units originally used to establish the initial contract rents unless they could show that those units were no longer comparable. Appended to the memorandum were sample letters for notifying project owners of rent adjustments pursuant to the AAAFs or to a comparability study. In the latter situation, it was specified that the letter must list the unassisted units used in the comparison, explain how the rent adjustments were computed, and inform the project owner of his or her appeal rights.

In the field offices where comparability studies were performed, two different methods were used.

6. A September, 1983, telephonic Survey of all 54 field offices of HUD which are responsible for administering the Section 8 program for Section 8 projects within their jurisdiction, summarizes which of the field offices were then conducting some type of comparability surveys. [46% of the field offices were performing comparability reviews, while 54% were not.] There is no assurance that further investigation would not reveal more variances than are indicated in the Surevey, . . .

7. The . . . Survey identifies at least two different processes for conducting comparability surveys, although there may be more. There is no assurance that these processes are uniformly followed for all Section 8 new construction projects in any one field office. . . .

Id.

Furthermore, it is clear that the haphazard enforcement is directly related to and flows from the absence of any uniform guidelines. The following is an excerpt from p. 1 of a memorandum of February 22, 1983 from Donald E. Kirkendall, HUD Assistant Inspector General for Audit, to Philip Abrams, HUD Assistant Secretary for Housing-Federal Housing Commissioner, concerning the survey by the Office of Inspector General of HUD discussed above:

Our office has completed a survey to determine whether the Field Offices are enforcing the regulatory requirement that Section 8 rents are comparable to rents for unassisted units and whether enforcement affected or should have affected rent increases. The attached report contains one finding with a recommendation to finalize and issue proposed changes to

HUD Insured Servicing Handbook 4350.1 within 60 days, thus ensuring that timely and consistent comparability analyses are performed.

Comparability analyses were not performed in seven or eight Field Offices reviewed. In the eighth Field Office, different methodologies were used to determine whether rents were comparable. In 14 of 42 projects reviewed, Section 8 rents were not comparable to those rents for unassisted units. In 28 projects, the rents were comparable; however, this occurred, not because of any Field Office action or by design but simply because rents for comparable units happened to increase as much as, or more than, Section 8 rents. As a result, HUD is not assured that Section 8 rents maintain parity with rents for unassisted units. *The cause for this situation is that procedures requiring comparability analyses and providing instructions on how to perform such analyses have not been established.* We note that such procedures are included in proposed changes to Handbook 4350.1, HUD Insured Servicing. Therefore, we recommend that the proposed changes be finalized and the revised Handbook be issued within 60 days. This action would ensure that timely and consistent comparability analyses are performed.

(Emphasis supplied.) Exhibit Attached to Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendant's Motion for Summary Judgment, July 18, 1985.

By challenging HUD's lack of standards for conducting comparability reviews, plaintiffs have called into question whether HUD afforded them the due process to which they are entitled in selecting them to undergo comparability analyses and, in the Mayers' case, performing a

study. In recent years, courts have begun taking increasing note of the procedural due process problems occasioned by the exercise of agency discretion uncontrolled by any systematic procedural and substantive standards. *See, e.g., Historic Green Springs, Inc. v. Bergland,* 497 F. Supp. 839, 851-856 (E.D. Va. 1980), and the case cited therein; *Northern California Power Agency v. Morton,* 396 F. Supp. 1187 (D.D.C. 1975), *affirmed sub nom. Northern California Power Agency v. Kleppe,* 539 F.2d 243 (D.C. Cir. 1976). *See also Matzke v. Block,* 732 F.2d 799 (10th Cir. 1984); *Industrial Holographics, Inc. v. Donovan,* 722 F.2d 1362, 1367 n.9 (7th Cir. 1983); *Allison v. Block,* 556 F. Supp. 400, 404-405 (W.D. Mo. 1982), *aff'd,* 723 F.2d 631 (8th Cir. 1983); 2 K. Davis, *Administrative Law Treatise* § 7:26 (2d. ed. 1979); K. Davis, *1982 Supplement to Administrative Law Treatise* §§ 5:10, 8:4 (1982). As the court put it in *City of Santa Clara, California v. Kleppe,* 418 F. Supp. 1243, 1260-61 (N.D. Cal. 1976), *aff'd in part and rev'd in part on other grounds sub nom. City of Santa Clara, California v. Andrus,* 572 F.2d 660 (9th Cir. 1978), "[c]ourts have with increasing frequency recognized that due process means that administrators must do what they can to structure and confine their discretionary powers through safeguards, standards, principles and rules."

But before addressing the merits of the question, the court must first decide whether plaintiffs have a sufficient property interest to invoke a right to procedural due process. *Historic Green Springs, supra* at 852. The relevant provision of the Housing Act, 42 U.S.C. § 1437f(c)(2)(A), states that

> [t]he assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect

> changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

This language leaves absolutely no doubt that Section 8 project owners have a statutorily as well as contractually mandated property right to an annual or more frequent rent adjustment of the nature described.

Turning to the merits, the court concludes on the basis of the record before it that HUD has not and cannot fairly administer the comparability limitation in the absence of some uniform guidelines to be applied on a consistent, nationwide basis. As the situation now stands and has since certain field offices first began performing comparability reviews in 1981, Section 8 project owners in different parts of the country have been subjected to differing procedures without any justifying rationale. Whether a comparability review is performed on no projects, all projects or a selected number of projects in a given area lies within the totally unfettered discretion of the personnel in the particular field office responsible for administering HAP contracts in that area. There is no procedure whatsoever for ensuring that the selection of projects which must undergo comparability analysis is done on a principled, nonarbitrary basis. Moreover, once the selection is made, there are no guidelines to ensure that the comparability reviews are conducted pursuant to some consistent system or methodology. As a result of this lack of guidelines, for example, a HUD appraiser performed the comparability study on the Stockton project at government expense, while Mr. Dally was informed that he himself would be required to perform such a study on the Rainier View project. Again, due to the confusion engendered by the lack of any system in the Seattle HUD Area Office, no study was

ever performed on Rainier View, which later received a retroactive full rent increase in accordance with the AAAFs, while the Mayers were ordered to reduce their rents from the existing levels pursuant to the result of the comparability review of the Stockton project.

Indeed, the court's conclusion that HUD needs to devise standards in order to apply the comparability limitation in a manner consistent with procedural due process should come as no surprise to the government. More than five years ago, a HUD official received exactly the same advice from his own legal staff. In a memorandum dated August 28, 1980, Joseph F. Gelletich, HUD Low-Rent Housing Branch, wrote to Conrad Egan, HUD Office of Multifamily Housing Management and Occupancy, as follows at pp. 3-4 concerning a question about the overall limitation on Section 8 rent adjustments:

> 4. . . . Does it make any difference that only a few offices in the country do current comparability analyses?
>
> . . . [T]here is a potentially adverse legal exposure to HUD when only a few field offices perform a project specific comparability analysis in applying the overall limitation. To minimize this, we recommend that field offices be instructed that they may presume that use of the annual adjustment factor results in a correct adjustment, consistent with the overall limitation, and that there is no need to do a comparability analysis for each project on an annual basis. However, where the field office has reason to believe that the rents are or would be, after application of the adjustment factor, in excess of the relationship initially approved, it may provide less than the full amount of the adjustment or, where appropriate, provide no upward adjustment or reduce Contract Rents. We will

work with you to determine whether to measure the relationship in subsequent years by considering the initial dollar difference or the initial percentage difference.

To avoid or minimize legal challenges that this approach is arbitrary and capricious, the handbook should include a system for field offices to check on whether the factors are resulting in correct rent adjustments. This could include requiring field offices to conduct a random sampling every two or three years to assure that the factor is resulting in rents which are comparable. Where the sample indicates problems with the factor, steps should be taken to establish a separate factor for a market area now included in one of the broad census region categories or to correct the factor for one of the SMSAs for which an individual factor is now published on a regular basis. *This or another system to assure that an owner is not being treated arbitrarily must be established if HUD is to preserve its ability to apply the overall limitation.*

(Emphasis supplied.)

D. Nature of Standards

The court does not intend to dictate to HUD the way in which it should devise standards or the form which they must take. In other words, the court is not ruling that HUD must necessarily engage in formal promulgation of regulations. It may well be that internal agency guidelines will serve the purpose; if that is the case, then HUD might choose, for example, to issue the long awaited section of the agency handbook on the comparability limitation. The decision will be for HUD to make after an evaluation of the nature of the procedural and substantive standards it

wishes to establish and the attendant legal ramifications and requirements. The court does, however, expect that interested parties will be afforded notice of the standards.

E. Other Issues

If, as the court has ruled, HUD must develop procedural and substantive standards concerning the selection of projects and the conduct of comparability analyses before it can exercise its discretion to apply the comparability limitation, then HUD violated plaintiffs' right to procedural due process by attempting to conduct and, in the Mayers' case, actually conducting a comparability review without any standards. The comparability study done on the Stockton project is accordingly invalid and the Mayers are entitled to a rent increase for the period from December 1, 1982 through November 30, 1983 in accordance with the AAAFs. Therefore, the court need not reach the issues raised by the Mayers concerning the selection of comparable units other than those used to establish the original contract rents; whether the difference in rents between assisted and comparable unassisted units can be calculated as a fixed dollar amount rather than the percentage used to establish the initial difference at the time the contract rents were first set; and the requirements of due process with regard to appeals from HUD determinations concerning the comparability limitation. The court expects HUD to address these issues together with the rationale for its conclusions in the standards it devises.

Finally, the government argued that HUD's determination concerning the appropriate rental adjustment for the units in the Stockton project is unreviewable because it is agency action committed to agency discretion within the meaning of the APA, 5 U.S.C. § 701(a)(2). Because the court is not reaching the issue of whether HUD's deter-

mination in the Mayers' case was correct, the government's argument is inapplicable.

III. CONCLUSION

The government's motion for summary judgment is DENIED and the court GRANTS summary judgment for plaintiffs as set forth above.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 15th day of January, 1986.

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-3661, 86-3685
DC# CV-83-997-R
Western Washington (Seattle)

RAINIER VIEW ASSOCIATES, ET AL.,
PLAINTIFF/APPELLEES/CROSS-APPELLANTS

VS.

UNITED STATES OF AMERICA,
DEFENDANT/APPELLANT/CROSS-APPELLEE

AND

HOUSING AUTHORITY OF THE CITY OF BREMERTON,
DEFENDANT-APPELLANT

[Filed Nov. 14, 1986]

ORDER

Before: KOELSCH and HALL, Circuit Judges

The United States' motion to transfer the appeal and cross-appeal in Nos. 86-3661 and 86-3685 to the Federal Circuit pursuant to 28 U.S.C. § 1631 is denied. We decline to read into 28 U.S.C. § 1295 a requirement that would subordinate this court to the Federal Circuit with regard to such traditional and inherent functions as determining our own jurisdiction and supervising the exercise of jurisdiction by district courts within this circuit.

The United States' motion to dismiss the appeal in No. 86-3661 and vacate the judgment below as moot is denied. The United States has failed to show that the district court's declaratory judgment is moot as regards the re-

maining terms of the appellees' Housing Assistance Payment contracts.

The United States' motion to suspend the briefing schedule pending the motion to vacate and dismiss the appeal is denied as moot.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C83-997R

RAINIER VIEW ASSOCIATES, A WASHINGTON LIMITED PARTNERSHIP; KURTIS R. MAYER AND PAMELA MAYER, D/B/A/ MAYER BUILT HOMES, PLAINTIFFS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AND THE HOUSING AUTHORITY OF THE CITY OF BREMERTON, DEFENDANTS

[Filed Aug. 17, 1987]

ORDER GRANTING PLAINTIFFS' MOTION FOR SUPPLEMENTARY RELIEF BASED UPON DECLARATORY JUDGMENT

THIS MATTER comes before the court on a motion by plaintiffs Rainier View Associates and Kurtis R. and Pamela Mayer d/b/a Mayer Built Homes for supplementary relief based upon a declaratory judgment order issued by this court. Having reviewed the motion, together with all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

The background of this case was set forth in the court's prior order granting summary judgment for plaintiffs issued on January 16, 1986. That order concluded at p. 16 that HUD could not "fairly administer the comparability

limitation in the absence of some uniform guidelines to be applied on a consistent, nationwide basis." The court accordingly ruled that HUD could not conduct any more comparability reviews until it devised standards for applying the comparability limitation in a manner consistent with procedural due process, including precedural and substantive standards concerning the selection of projects and the conduct of comparability analyses. *Id.* at 16-19. While the court refused to dictate any particular method of compliance with the order, it did "expect that interested parties [would] be afforded notice of the standards."

Plaintiffs now come before the court asking for relief from HUD's renewed attempts to conduct comparability reviews without having issued any standards in defiance of the court's order of January 16, 1986. To their knowledge, when they filed their motion, HUD had done nothing to comply with the court's directive.

The government responds that HUD has indeed been proceeding according to guidelines conforming to the requirements of due process. In support of this argument, it points to two internal memoranda which the court reviewed before it issued its decision and deemed insufficient. The government also submits two additional internal memoranda, one of which is dated January 14, 1986, two days before the court's order, and which was obviously not composed in response to the ruling of the court. The other is very brief, only four paragraphs long, and was issued on April 20, 1986, approximately six weeks after plaintiffs filed the instant motion.

Having carefully examined these memoranda, separately and together, the court concludes that they are totally insufficient. In his brief, counsel for the government attempts to weave bits of information from the different memoranda into something resembling a comprehensive

set of standards. Federal Defendant's Opposition to Plaintiffs' Motion for Supplementary Relief Based Upon Declaratory Judgment, pp. 7-14. However, try as he might, he cannot make whole cloth out of what amounts to a pile of threads.

More importantly, the crucial questions which troubled the court have not been addressed. The memoranda on which the government relies do not in any way indicate *specifically* how projects are selected for comparability studies. Not all projects which might be subjected to such studies actually undergo them each year. How is the decision made as to which ones do? The memoranda do not address this question.

Nor do they tell the court or anyone else *specifically* how the comparability studies are to be performed. How are the comparable buildings selected? How are allowances made for differences between the project in question and the comparable buildings? For example, the HUD internal memorandum of April 20, 1987 states that each regional office is to maintain and regularly update a rental data bank. How are these data banks to function? Do they exist now? If not, where does the information on which HUD relies now come from?

Plaintiffs also point out that HUD has failed to address the "initial difference" issue, much less to explain its rationale. The government responds disingenuously that while the court did state that it "expected" HUD to address the question, "that expectation is hardly a requirement of the Court's declaratory judgment." Federal Defendant's Opposition Memo, p. 18 n.28. The government is wrong.

Furthermore, the court ruled that, whatever form the HUD guidelines took, interested parties should receive notice. Plaintiffs in this case never got notice of these

internal memoranda except in the context of this lawsuit, which was not the sort of notice the court had in mind. There is no excuse for this failure on the part of HUD.

Finally, the court takes note of Donald W. Hanford's supplementary affidavit submitted in support of plaintiff's motion. Attached to that affidavit is a copy of a letter received by a Section 8 owner from the HUD Caribbean office. The letter states that the regional office in Puerto Rico performed its market rent comparability study pursuant to draft changes to Chapter 10 of HUD Handbook 4350.1 entitled "Section 8 Rent Increase." The letter further indicated that, to the writer's knowledge, draft changes to the handbook are not available for distribution to the public. It is clear that, contrary to this court's clear directive of January 16, 1987, HUD regional offices are not conducting comparability studies according to "uniform guidelines . . . applied on a consistent, nationwide basis."

In conclusion, the court finds that HUD has failed to comply with the court's declaratory judgment of January 16, 1987. Therefore, any comparability studies which HUD has conducted on plaintiffs' property are invalid and they are entitled to rent increases in accordance with the Automatic Annual Adjustment Factors until HUD issues procedural and substantive standards in compliance with the court's order of January 16, 1987. As for the issue of attorneys' fees, the court will reserve ruling on it. In any event, plaintiffs have not submitted any substantiation of the fees incurred.

Plaintiffs' motion is accordingly GRANTED.

IT IS SO ORDERED.

The Clerk of the Court is directed to send copies of this Order to counsel of record.

DATED at Seattle, Washington this 14th day of August, 1987.

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-3685

RAINIER VIEW ASSOCIATES, ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Filed October 16, 1987

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, KENNEDY, ANDERSON, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, and LEAVY, Circuit Judges.

ORDER

Upon the vote of a majority of the regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Rule 35-3 of the Rules of the United States Court of Appeals for the Ninth Circuit. The previous three-judge panel assignment is withdrawn.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C83-997R

RAINIER VIEW ASSOCIATES, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed Dec. 24, 1987]

ORDER GRANTING PLAINTIFFS' MOTION FOR PERMANENT INJUNCTION

This matter comes before the court on a motion by plaintiffs for a permanent injunction based upon this court's declaratory judgment and for an order granting supplementary relief.[1] Having reviewed the motion together with all documents submitted in support and in opposition, and being fully advised, the court finds and rules as follows:

On January 16, 1986, this court granted plaintiffs' request for a declaratory judgment that, in the absence of any guidelines on how to conduct comparability studies, defendant United States of America acting through the Department of Housing and Urban Development (hereafter "HUD") was violating the constitutionally guar-

[1] Plaintiffs also move for preliminary injunctive relief. In light of the court's ruling, this motion is stricken as moot.

anteed right to due process by using the results of those studies as the basis for determining the rents to be collected from Section 8 projects. On August 18, 1987, this court granted plaintiffs' motion for supplementary relief, holding that HUD had failed to comply with the court's declaratory judgment in that it was still conducting comparability studies without having issued any regulations or guidelines.

Plaintiffs now move for an order enjoining HUD from using comparability studies to determine not only their rents, but also the rents for other Section 8 projects whose owners are helping to fund this litigation. It appears that HUD is following the court's Order of August 18, 1987 as construed in the narrowest possible fashion. In other words, HUD is not doing comparability studies of Rainier View and Stockton, the projects owned by the named plaintiffs in the two cases consolidated before this court. But HUD is continuing to conduct such studies on other projects, including those owned by financial supporters of this litigation. Plaintiffs seek to broaden the injunctive relief to cover those projects too.

HUD responds that plaintiffs' motion must be denied because: (1) the court's declaratory judgment by its terms only applies to named plaintiffs; (2) the named plaintiffs themselves are not threatened with any injury because HUD is not doing comparability studies on Rainier View and Stockton; (3) the named plaintiffs lack standing to obtain relief on behalf of nonparties not included within the scope of the declaratory relief; and (4) in the absence of a certified class, the named plaintiffs cannot obtain injunctive relief broader than that which is necessary to address their problems.

HUD's first argument has no merit. It is true that the declaratory judgment was written in the context of plain-

tiffs' factual situations. But the import of the declaratory judgment is much broader. The court concluded that, in the absence of any guidelines to regulate the conduct of comparability studies, their use is unconstitutional as a violation of due process under any circumstances.

HUD's three other objections all raise the same basic question: Even if the declaratory judgment does set forth a generally applicable ruling about the constitutionality of HUD's use of comparability studies, can this court issue a broad injunction affording relief to nonparties as well as to the named plaintiffs?

While the answer to this question may have been uncertain when the parties submitted their briefs, a very recent Ninth Circuit opinion which is directly on point resolves the issue in favor of plaintiffs' position. In *Bresgal v. Brock,* Nos. 86-3996; 86-4072 (9th Cir. Nov. 18, 1987), the district court had issued a declaratory judgment that the Migrant and Seasonal Agricultural Workers Protection Act was applicable to commercial forestry workers coupled with a broad injunction requiring the Secretary of Labor to enforce the judgment in the forestry industry.

The Secretary appealed to the Ninth Circuit, arguing that injunctive relief could properly cover only the named plaintiffs in the absence of a certified class. In support of this argument, the Secretary cited *National Center for Immigrants' Rights v. INS,* 743 F.2d 1365, 1371 (9th Cir. 1984), *vacated,* 107 S.Ct. 1881 (1978), and *Zepeda v. INS,* 753 F.2d 719 (9th Cir. 1985), the same cases on which HUD relies in this case. *National Center for Immigrants' Rights* and *Zepeda* both held that, because no class had been certified, preliminary injunctive relief should be limited to apply only to the named plaintiffs.

The Ninth Circuit in *Bresgal* found these cases readily distinguishable on the grounds that they both involved preliminary injunctions rather then injunctive relief issued

after declaratory judgment. In the former situation, the scope of the relief is properly limited because the court has not ruled on the substantive issues in the case beyond a finding that plaintiff has shown some probability of prevailing on the merits. By contrast, in *Bresgal* as in the instant situation, the issue is enforcement of a final ruling. As noted in *Bresgal,* there is no general requirement that an injunction affect only the parties in the suit. *Id.* at 12-13.

The Ninth Circuit then went on to hold that there is no bar to nationwide relief in federal district court when it is appropriate. Nor does the fact that this court's injunction might affect the rights of nonparties necessarily render such relief inappropriate as long as the injunction is directed against HUD, which is a party. *Id.* at 14-15.

See also Doe v. Gallinot, 657 F.2d 1017, 1024-25 (9th Cir. 1981). In that case, the district court had declared unconstitutional certain provisions of a state statute regarding commitment to mental institutions and enjoined defendants from committing people under the statute for more than 72 hours without a mandatory probable cause hearing. Defendants protested on appeal that, while the court could certainly enjoin their behavior with regard to the named plaintiff, the court lacked jurisdiction to enjoin defendants from committing nonparties.

The Ninth Circuit held that the district court undeniably had the power to declare the statute unconstitutional. Having done so, the district court was empowered to grant relief effectuating its judgment. Because the statute was unconstitutional as applied to anyone, not just to the named plaintiff, the court could broadly enjoin the defendants from applying it. The Ninth Circuit also noted that the district court's order only bound defendar ts and did not purport to exercise power over people not properly before it.

Having carefully considered the circumstances of this case in light of the Ninth Circuit precedent discussed above, the court concludes that an order enjoining HUD from conducting comparability studies without guidelines in this federal judicial district is appropriate. The import of the court's declaratory judgment is that such studies violate due process when used to determine rents on any Section 8 project, not just on projects owned by the named plaintiffs. At the same time, the court will limit the relief to this district in order to allow other courts to address the law in this relatively undeveloped area of whether administrative discretion has been properly exercised.

In ruling as it does, this court feels compelled to point out that it is HUD's behavior in this case which makes injunctive relief imperative. Although HUD has not openly defied the court, it has done absolutely nothing to comply with the court's rulings until confronted with a direct court order. Even then, HUD has chosen to comply in only the most narrow way possible to avoid a contempt citation. In other cases, courts have refused to order injunctive relief based on their "confident assumption that the [government agency] will proceed appropriately, in good faith, and in a manner fully consistent with the declaratory relief granted . . . without the coercion of a court order." *Investment Annuity, Inc. v. Blumenthal,* 442 F. Supp. 681 (D.D.C. 1977). This court cannot rely on any such assumption in the instant case.

Plaintiffs' motion for injunctive relief is accordingly GRANTED as outlined above.[2]

IT IS SO ORDERED.

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[2] Plaintiffs also request that the court order HUD to submit any future proposed regulations or guidelines on comparability studies to the court for review before implementing them. The court declines to do so.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 23rd day of December, 1987.

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN

Chief United States District Judge

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-3685

RAINIER VIEW ASSOCIATES, ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

Filed March 7, 1988

Before: WALLACE, ANDERSON, TANG, SCHROEDER, ALARCON, REINHARDT, BEEZER, BRUNETTI, NOONAN, THOMPSON, and O'SCANNLAIN, Circuit Judges.

ORDER

The order filed October 16, 1987, is vacated and this case is reassigned to the three-judge panel.

Judges BRUNETTI, THOMPSON, and O'SCANNLAIN dissent.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-3685

RAINIER VIEW ASSOCIATES, ET AL., PLAINTIFFS-APPELLEES

v.

UNITED STATES, DEFENDANT-APPELLEE

[Filed Mar. 7, 1988]

Before: WALLACE, ANDERSON, TANG, SCHROEDER, ALARCON, REINHARDT, BEEZER, BRUNETTI, NOONAN, THOMPSON, AND O'SCANNLAIN, Circuit Judges.

ORDER

On October 16, 1987, the court ordered that this case be taken en banc and the three-judge assignment was withdrawn. The basic issue that we thought needed resolution was whether the court had jurisdiction. It was suggested that the decision involved a choice between two prior cases: *North Side Lumber Co. v. Block,* 753 F.2d 1482 (9th Cir. 1985), and *Lehner v. United States,* 685 F.2d 1187 (9th Cir. 1982).

We conclude that to decide this case, no choice need be made. Clearly, if *Lehner* applies, the court has jurisdiction. There would also be jurisdiction under *North Side* as this case, although "contract-related," rests at bottom on statutory or regulatory rights. *See* Complaint, pp. 6-7.

Therefore, we vacate our order dated October 16, 1987, and reassign the case to the three-judge panel.

ANDERSON, ALARCON, and BEEZER, Circuit Judges, concurring:

We concur in this order because it does not purport to decide whether the *Lehner* and the *North Side* decisions conflict or were correctly decided.

NOONAN, Circuit Judge, concurring:

I conclude that to decide this case, no choice need be made.

BRUNETTI, THOMPSON, and O'SCANNLAIN, Circuit Judges, dissenting:

We disagree with the majority that no choice need be made between *North Side Lumber Company v. Block,* 753 F.2d 1482 (9th Cir. 1985), and *Lehner v. United States,* 685 F.2d 1187 (9th Cir. 1982), *cert. denied,* 460 U.S. 1039 (1983). Those two opinions are in conflict concerning the exclusivity of Tucker Act remedies in contract actions. This is a contract action; and we believe that the majority is incorrect in finding that it "rests at bottom on statutory or regulatory rights."

Accordingly, we dissent.

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C83-997R

RAINIER VIEW ASSOCIATES, A WASHINGTON LIMITED PARTNERSHIP; KURTIS R. MAYER AND PAMELA MAYER, D/B/A/MAYER BUILT HOMES, PLAINTIFFS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, AND THE HOUSING AUTHORITY OF THE CITY OF BREMERTON, DEFENDANTS

[Entered Apr. 15, 1988]

ORDER GRANTING GOVERNMENT'S MOTIONS FOR CLARIFICATION AND ENTRY OF JUDGMENT, DENYING STAY PENDING APPEAL AND DENYING PLAINTIFFS' MOTION FOR CONTEMPT JUDGMENT

THIS MATTER comes before the court on several motions by plaintiffs and defendant United States of America ("the government"), including the government's motions for clarification of injunction order, for entry of judgment and for stay of injunction pending appeal, as well as plaintiffs' motion for issuance of show cause order and for contempt judgment. All of these motions concern the effect of injunctive relief previously issued by this court. Having reviewed the motions together with all documents filed in

support and in opposition, and being fully advised, the court finds and rules as follows:

The background of this case has been fully described in previous rulings by the court. The parties are now back again, largely because the government appears incapable of comprehending and obeying the court's injunctive orders.[1] For the government's edification, the court will now spell out in simple, concise terms exactly what the government is ordered to do. If the government fails to adhere to the court's orders in future, those government officials responsible for the failure shall be held in contempt and sanctions will be imposed.

In its Order Granting Plaintiffs' Motion for Permanent Injunction issued on December 24, 1987, the court stated that "an order enjoining HUD from conducting comparability studies without guidelines in this federal judicial district is appropriate." Pursuant to this ruling, the government is enjoined from conducting any comparability studies on Section 8 projects in the Western District of Washington until it issues guidelines comporting with the constitutional requirement of due process. Thus, the government cannot do any comparability studies on any Section 8 project in this federal judicial district, whether or not the government plans to base rent determinations on the results of those studies.[2]

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[1] If the government continues to be mystified by the meaning of the court's directives, then it should move for clarification *immediately*. There is no excuse for waiting until plaintiffs ask for contempt sanctions to plead confusion and lack of understanding.

[2] In its motion for clarification, the government points to language in the court orders condemning the use of comparability studies as a basis for adjusting rents on Section 8 projects. Based on this language, the government argues that the court probably did not intend to enjoin the conduct of the studies themselves, only the use of the results. It frankly did not occur to the court that the government would want

Plaintiffs complain in their motion for contempt judgment about the government's position that it need not make retroactive rent adjustments based on AAAF factors. The government responds that the court only enjoined the conduct of comparability studies and did not specifically order retroactive payment of rent adjustments.

Perhaps the court lacks imagination; certainly it failed to conjure up all the possible linguistic loopholes which the government has sought to exploit. Indeed, the court simply assumed that the government would comply in good faith with its statutory and contractual obligations to make annual rent adjustments on all Section 8 projects. *See* 42 U.S.C. § 1437f(c)(2)(A) and the Section 8 contracts concluded between HUD and project owners. Thus, if the government could not use comparability studies as a basis for rent adjustments, the court assumed that it would apply the only other available adjustment mechanism, the AAAF factors. That assumption was evidently not justified. Therefore, the court now orders the government to make the required annual rent adjustments, both retroactive and prospective, on all Section 8 projects by applying the AAAF factors.

Two other issues remain. The government moves for entry of judgment granting injunctive relief under Rule 58, Fed. R. Civ. P., on the grounds that unless such a judgment is set forth in a separate document, the injunction is not effective. This motion is granted.

The government also moves for stay of the injunction pending appeal. In order to obtain such a stay, the government must meet the standard for a preliminary injunction. It must show: (1) a probability of success on the merits; (2) a possibility of irreparable injury; and (3) great relative

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to burden itself as well as Section 8 project owners with the expense of conducting illegal studies the results of which are unusable.

hardship. *Lopez v. Heckler,* 713 F.2d 1432, 1435-36 (9th Cir. 1983). The public interest should also be considered. *Warm Springs Dam Task Force v. Gribble,* 565 F.2d 549, 551 (9th Cir. 1977). The court concludes that the government can establish none of these criteria.

Regarding the probability of success on the merits, the government raises no arguments concerning the alleged overbreadth of the injunction which the court has not already considered and rejected. The court likewise rejects the government's argument about lack of standing. Plaintiffs clearly had standing to invoke the court's injunctive power in support of its declaratory judgment, which the government otherwise would have ignored, and to request clarification of the scope of the injunction. *Compare Doe v. Gallinot,* 657 F.2d 1017, 1024-25 (9th Cir. 1981), in which the Ninth Circuit rejected the same contention. As for the government's assertion of a jurisdictional bar because plaintiffs had another adequate remedy in the Court of Claims, the Ninth Circuit has already ruled against the government in this case on this very point, *Rainier View Associates v. United States,* No. 86-3685 (Mar. 7, 1988).

The government contends that it will suffer irreparable harm unless the injunction is stayed, that the balance of hardships favors the government, and that the public interest will be undermined by requiring the government to expend money which it cannot later recoup. The court cannot agree. Having balanced the relative hardships and considered the potential injury to all concerned, the court finds that by far the greater harm threatens Section 8 project owners, the tenants of these housing developments and the public, all of whom have an interest in ensuring the continued availability of low-income housing. Even if the government would suffer irreparable injury due to its inability to recoup overpayments to owners, its showing of

likelihood of success on the merits is not sufficient to warrant relying on this factor.

For the above stated reasons, the government's motion for clarification of order is GRANTED as is its motion for entry of judgment. The Clerk of Court shall enter a separate judgment on the court's Order Granting Plaintiffs' Motion for Permanent Injunction issued on December 24, 198 . The government's motion for stay pending appeal is DENIED. The court also DENIES plaintiffs' motion for contempt judgment against government officials. However, the government shall make both retroactive and prospective rent adjustments based on the AAAF factors as set forth above.

IT IS SO ORDERED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 14th day of April, 1988.

/s/ Barbara J. Rothstein

BARBARA J. ROTHSTEIN
Chief United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-3630, 88-3814
DC# CV-83-997-R
Western Washington (Seattle)

RAINIER VIEW ASSOCIATES, ET AL., PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

[Filed May 18, 1988]

Before: HUG and BRUNETTI, Circuit Judges

Case No. 88-3814 is released from the prebriefing conference program. Case No. 88-3814 is consolidated with Case No. 88-3630 for all purposes.

Appellant's motion for a stay pending appeal is granted except with respect to the plaintiffs in these cases.

Appellant shall file its opening brief in these cases on or before May 31, 1988. The remainder of the briefing schedule shall proceed in accordance with Fed. R. App. P. 31(a). The Clerk is authorized to make any changes it deems necessary to this briefing schedule. These cases shall be calendared as soon as practical after briefing is completed.

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 88-3630, 3814
DC No.

RAINIER VIEW ASSOCIATES, ET AL., PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

[Filed Nov. 16, 1988]

Before: TANG, THOMPSON, and O'SCANNLAIN, Circuit Judges

The appeal is dismissed on grounds of mootness. *See Rainier View Associates v. United States,* 848 F.2d 988 (9th Cir. 1988), *reh'g denied,* Oct. 19, 1988.

APPENDIX I.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-3685
DC No. CV-83-997-R

RAINIER VIEW ASSOCIATES, A WASHINGTON LIMITED PARTNERSHIP; KURTIS R. MAYER AND PAMELA MAYER, DBA MAYER BUILT HOMES, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLEE

[Filed and entered June 6, 1988]

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED.

APPENDIX M

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-3685

RAINIER VIEW ASSOCIATES, A WASHINGTON LIMITED PARTNERSHIP; KURTIS R. MAYER AND PAMELA MAYER, DBA/MAYER BUILT HOMES, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, ACTING THROUGH THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEFENDANT-APPELLEE

[Filed Nov. 15, 1988]

ORDER

Before: FLETCHER, BOOCHEVER, and NORRIS, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Fletcher and Norris vote to reject the suggestion for en banc rehearing, and Judge Boochever so recommends.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00149